

**APPLICATION FOR EXECUTIVE CLEMENCY
FOR
JOHN G. SPIRKO, JR.**

Respectfully submitted on John Spirko's behalf by:

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I. INTRODUCTION

John G. Spirko, Jr. faces execution on November 15, 2005, for the aggravated murder of Betty Jane Mottinger in 1982, a crime that Spirko did not commit and for which he was wrongfully convicted in 1984. Spirko has always staunchly maintained his innocence and continues to do so today. Spirko believes that a fair reading of the entire record developed to date strongly supports his innocence and overwhelmingly leads to the conclusion that he was wrongfully convicted. The jury was denied the opportunity to consider extensive critical evidence that has now finally been revealed demonstrating that the State's trial theory, much of its evidence, and its argument were untrue. Had this evidence been available to Spirko, he would have been able to present it to the jury and establish his innocence. Today far too much doubt exists about this case to allow Spirko's execution to proceed.

Based on the current record, Spirko believes he is entitled to a full pardon from the Governor. At the very least, Spirko submits that there is far too much doubt to permit the State to carry out the death penalty here, such that a commutation would be appropriate. Finally, under the unique present posture of this case – where a postal inspector colleague of Hartman has just come forward raising serious concerns that an innocent man will be executed – it would be appropriate for the Governor to grant a reprieve in order to permit Spirko and the State to investigate fully the serious allegations that have been put forward.¹

¹ During the pendency of a period of reprieve, the Governor should also consider directing the Parole Board, or appointing a Special Prosecutor, to review the entire record and to conduct an independent investigation in an effort to resolve the many critical unanswered questions that remain today in Spirko's case. It is critical that these questions be answered before even considering whether Spirko's execution should be allowed.

The theory of the State's case, its evidence, and its argument, was that John Spirko and his former Kentucky cellmate, Delaney Gibson, together abducted Betty Jane Mottinger, the postmistress in the tiny hamlet of Elgin, Ohio, at 8:30 a.m. on August 9, 1982, and subsequently murdered her. It is now abundantly clear that that theory and the evidence that supported it were untrue and incorrect and that the State knew they were untrue at the time the State presented its case to the jury in August 1984. The principal State witness and lead investigator, Postal Inspector Paul Hartman, has now recently stated on at least three separate occasions to three different groups of people that based upon the evidence he had accumulated during his thorough investigation, he had concluded prior to Spirko's trial that the State's trial theory and evidence were untrue.

Furthermore, there has never been any physical or forensic evidence of any kind linking Spirko to this crime. There is no available DNA evidence that either inculpates or exonerates Spirko; the only fingerprints recovered from the scene of the crime are not Spirko's or Gibson's and remain unidentified;² and not one solitary piece of physical evidence connected to the crime has ever been linked in any way to Spirko or, for that matter, to Gibson. There is no question that convictions may rest on circumstantial evidence, but when the circumstantial evidence raises the serious doubts that exist in this case, the lack of physical or forensic evidence becomes even more significant.

² Despite undersigned counsel's repeated requests, there still has been no effort to match those fingerprints recovered from the scene utilizing the FBI's current technologies and database.

This case now rests *exclusively* on the significance to be applied to alleged uncorroborated oral statements made by Spirko to Hartman, most of which even the State claims were false. Hartman's own credibility now has been seriously called into question, and a careful examination of the details that Spirko allegedly told investigators and that the jury was told were not public knowledge reveals that many were, in fact, reported in the press and others were likely suggested to Spirko by Hartman or may have never been said by Spirko but were added to the interview notes by Hartman.

Beyond all of that, it simply makes no sense that Spirko and Gibson committed this crime. Neither knew Betty Jane Mottinger or had any connection whatsoever to Elgin. As Hartman himself has suggested, it is inconceivable and "defies common sense" that they would set out from hundreds of miles away in opposite directions to find and rob what is perhaps the smallest and most difficult to find post office in the entire state.³

As will be set forth more fully below, many compelling factors support a grant of executive clemency by the Governor. These include the absence of any physical or forensic evidence; the remarkable fact that Hartman himself had determined based on his own review of all the evidence that the Spirko/Gibson theory of the case was untrue; the fact that it is now clear that the State nonetheless proceeded at trial with an untrue and incorrect theory, evidence, and argument, while concealing the facts that disproved its theory from the defense; the fact that Spirko's own independently corroborated alibi places him in Toledo, more than 100 miles from Elgin, at the time of the abduction; the fact that at various times, others unconnected to John

³ Aff. of Thomas Hill at 2 (Exhibit 1).

Spirko have acknowledged involvement in this crime; the fact that the primary and critical State witness, Postal Inspector Paul Hartman, has now been discredited and shown to be a man able and willing to misrepresent the truth, both under oath and otherwise; and the fact that real doubt exists regarding whether Spirko indeed revealed facts that were not public knowledge during unrecorded oral statements evidenced only by Hartman's incomplete and suspiciously created notes.

II. THE PAROLE BOARD SHOULD NOT DEFER TO THE JURY'S VERDICT OR TO THE VARIOUS STATE AND FEDERAL DECISIONS UPHOLDING THAT VERDICT

The Parole Board should not defer to the jury's verdict or to the various state and federal decisions upholding that verdict in making its clemency recommendation to Governor Taft. The tendency to defer to the jury's verdict and to the decisions upholding that verdict is understandable. In this case, however, it must be resisted. The jury's verdict rests on a wholly incomplete and misleading record and false and misleading testimony and argument from both the State and Spirko. Likewise, the various court decisions upholding the verdict rest on the same incomplete record and false testimony and are, in any event, constrained by procedural obstacles that have been vigorously advanced by the State at every turn. Instead, because much of the most significant facts have been withheld and are just now—more than 20 years later—coming to light, this clemency decision must be made based upon the true and complete record as it exists today.

The Ohio Constitution provides that the Governor of Ohio “shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except

treason and cases of impeachment, upon such conditions as he may think proper.”⁴ This provision grants broad discretion to the Governor and in no way requires or suggests that the governor follow the jury’s verdict or court decisions in a particular case. Indeed, clemency is a remedy of last resort for a convicted inmate, particularly one sentenced to the death penalty. It is incumbent upon the Parole Board in making a recommendation to the Governor and upon the Governor in deciding upon a clemency application to make an independent evaluation of all the facts known *at the time* clemency is being considered. This need for independence is especially acute when an inmate has been sentenced to death, as this Board recently acknowledged:

This Board should not bind our executive review and fair assessment of death penalty cases to restrictive judicial notions of “*res judicata*,” rules of evidence, or “procedural default.” Our statutory duty is neither curtailed nor constrained by appellate judicial procedures. We should not simply defer to appellate courts on all issues of importance in capital cases. We have a duty to make our own independent analysis and judgment of life-and-death justice. The judiciary itself recognizes our rightful, separate authority in such matters:

...

We should not give blind deference to a jury’s recommendation of death when the quantum of proof has been diminished from that adduced at trial.⁵

In this case, it is especially appropriate for the Parole Board and the Governor to make an independent evaluation of the facts. As set forth in greater detail in this Application for Executive Clemency, the jury’s conviction and death sentence rested on untrue testimony and

⁴ Ohio Const. art. 3, § 11.

⁵ *In re Jerome Campbell*, #A211-228, State of Ohio Adult Parole Authority, at 11 (May 2, 2003) (emphasis original).

argument from both Spirko and the State's witnesses. In addition, even the State concedes that the jury did not hear the substantial body of evidence the State possessed at the time of trial, and that has been further developed in the years following. This evidence, unavailable and concealed from the jury, indicates that the State's trial theory, argument, and evidence were untrue, and, that Spirko was wrongfully convicted.

In Spirko's original Application for Executive Clemency, we asked the Parole Board to recommend that the Governor grant a reprieve in order to permit Judge Carr to rule on Spirko's then-pending motion for relief from judgment. On September 6, 2005, Judge Carr denied Spirko's motion for relief from judgment. However, the Parole Board and the Governor should give absolutely no deference whatsoever to that decision because *it is in no sense a decision on the merits*. Judge Carr ruled narrowly, and we believe incorrectly as a matter of law, that he could grant relief from judgment only if an "officer of the court" committed fraud before him in the original federal habeas proceeding. He ruled that only attorneys from the Attorney General's Office constitute officers of the court and that Paul Hartman and the Van Wert County Prosecuting Attorney are not officers of the court for purposes of the limited review he felt he was procedurally allowed to do. Accordingly, any fraud or errors committed by Paul Hartman or the Van Wert County Prosecuting Attorney would not, in Judge Carr's view, permit him to grant Spirko relief. Judge Carr held only that the Attorney General's Office did not commit any fraud on the court and therefore denied Spirko's motion.

Spirko's court case is far from concluded. Spirko appealed Judge Carr's decision to the United States Court of Appeals for the Sixth Circuit and requested an expedited briefing schedule. Spirko's attorneys were then sent by the Attorney General's Office a copy of a letter from a former Hartman colleague, Postal Inspector Gregory A. Duerr, to Chief Inspector Leroy

Heath raising further, serious questions about the credibility of Paul Hartman and Spirko's conviction and death sentence. Spirko asked the Sixth Circuit to remand the case to Judge Carr. The Sixth Circuit granted that request, and Spirko filed immediately his motion before Judge Carr to re-open discovery. The briefing on that motion will not be complete until just before Spirko's clemency hearing. Moreover, Spirko's counsel has just been granted the right to interview Inspector Duerr on October 7, 2005, and that interview could yield information relevant to the motion to re-open discovery pending before Judge Carr and to the instant Application for Executive Clemency. In addition, the Sixth Circuit, which affirmed the original denial of Spirko's habeas petition by a 2-1 vote, has yet to consider Spirko's appeal from the recent denial of his motion for relief from judgment.

Accordingly, although the current record creates abundant doubt as to the validity and legitimacy of Spirko's conviction and death sentence, doubt that is amply sufficient to compel a pardon or commutation, it remains appropriate, alternatively, for the Parole Board to recommend that the Governor grant a reprieve in order to give the courts the time and opportunity to rule on the legal claims that Spirko is raising both with respect to his claim that the denial of his habeas petition was fraudulently induced and also that arise in large part from the serious concerns and allegations just raised in the Duerr letter. It must be noted that this request is by no means a last-ditch effort to delay the execution. Inspector Duerr did not write his letter until August 31, 2005, and Spirko's attorneys were not provided the letter by the State until September 14, 2005. From the very moment that Spirko obtained the Duerr letter, he has acted as quickly as possible to (1) bring the matters raised in the Duerr letter to the attention of the courts and (2) obtain additional information regarding the matters raised in the Duerr letter. Nevertheless, if the courts ultimately

deny Spirko's claims for relief, the Parole Board and the Governor should not, for the reasons we have set forth, defer to those rulings.

III. FAR TOO MUCH DOUBT EXISTS TO PERMIT SPIRKO'S EXECUTION TO BE CARRIED OUT

No execution should ever take place unless there is the highest degree of confidence that the inmate in fact committed the crime and that the application of the death penalty is fair and appropriate under the circumstances. We should all be able to agree that the worst nightmare the criminal justice system can encounter is the execution of an innocent man. When there is doubt, based upon the totality of the record as it exists at the time of the scheduled execution, the execution must be halted. Doubt must be resolved in favor of life. In this case, there is simply far too much doubt to permit Spirko's execution to be carried out. We here set forth twenty-four separate reasons that Spirko's execution should not go forward. Any one of these should be sufficient to recommend the exercise of executive clemency; cumulatively, they set forth an overwhelming case for clemency.

1. There Is Absolutely No Forensic Or Physical Evidence Of Any Kind Linking John Spirko To The Mottinger Crimes

There is no forensic, physical or scientific evidence of any kind that links John Spirko to the Mottinger crimes.⁶ Indeed, evaluating everything we now know about the case, the only thing of any evidentiary value that at all conceivably links Spirko to the Mottinger crime is his alleged unrecorded and uncorroborated oral statements to Inspector Paul Hartman. This

⁶ *Spirko v. Mitchell*, 368 F.3d 603, 614 (6th Cir. 2004).

evidence, as will be shown below, is itself subject to serious doubt and cannot serve as the basis for Spirko's execution.

Notwithstanding the fact that the shroud in which Mrs. Mottinger's body had been wrapped was recovered, there is no DNA or other forensic evidence to link Spirko to the shroud or to Mrs. Mottinger's abduction or murder.⁷ Notwithstanding the fact that fingerprints were recovered from the scene of the Elgin Post Office, not any of them were the fingerprints of John Spirko or Delaney Gibson. Indeed, latent fingerprints were recovered from the safe in the post office that to this day remain unidentified by law enforcement and likely are the fingerprints of the perpetrators of this crime. We also now know that Mrs. Mottinger's abductors and murderers left behind a set of keys at the scene of the Elgin Post Office, and no fingerprints were recovered from these keys that could be linked to either Spirko or Gibson.

We also know that no forensic evidence was subsequently developed or uncovered as a result of Hartman's interviews of Spirko. Spirko was unable to give Hartman any information

⁷ Spirko filed an application for DNA testing with the Van Wert Common Pleas Court in 2004, asking the State to: 1) test any DNA testable material against Spirko's DNA and, 2) run any DNA test results through the FBI's Combined DNA Index System ("CODIS") to see if there were any "hits" that would show who was present at the crime scene. The State did not voluntarily agree to test the DNA in either manner Spirko requested. After both sides submitted briefs, the trial judge found that "the prosecution did fail to fulfill his duty under this court's order and the law by simply reporting that 'no information is available concerning the suitability for testing of the stain on the 'shroud' and the specks on the boots.'" However, the judge found that he did not have authority under the Ohio Revised Code to grant Spirko's application because the Code only authorizes DNA tests that would be "outcome determinative." The judge found that in Spirko's case, a DNA sample from the crime scene that did not match Spirko would not determine whether Spirko had participated in the crime. Similarly, the judge held that the Code did not authorize him to order the State to run any DNA samples through CODIS. We maintain, however, that the State should do so voluntarily in order to ensure that they are not executing the wrong man, and in order to determine who is responsible for the crime.

previously unknown to Hartman that might yield any corroborating physical evidence. For example, Spirko was unable to identify for Hartman the location of Mrs. Mottinger's murder so that latent fingerprints could be recovered from that location. Spirko was unable to tell Hartman where the knife used to kill Mrs. Mottinger could be found so it could be evaluated for DNA or fingerprint evidence. Spirko was unable to tell Hartman how it was that his fingerprints and Delaney Gibson's fingerprints were not found within the Elgin Post Office. Had Spirko actually committed this crime, one certainly would expect that he would have been able to provide Hartman with some information that would have enabled investigators to obtain corroborating physical or forensic evidence.

The complete and total lack of any physical, scientific or forensic evidence linking either Spirko or Gibson to the Mottinger crimes alone raises significant doubt as to the accuracy of the State's theory and the conviction they secured based upon that theory.

2. The State's Lead Investigator And Principal Witness At Trial, Paul Hartman, Has Now Acknowledged That He Had Concluded Based Upon His Review Of All Of The Evidence Collected By Him Prior To Spirko's Trial, That The State's Theory Of Its Case, Evidence, And Argument Were Untrue

As the Parole Board is well aware, we have recently learned that Paul Hartman, the State's lead investigator and principal witness at trial, had determined prior to Spirko's trial that the State's trial theory that Gibson and Spirko together committed the Mottinger crimes was untrue. Hartman's determination was unknown to defense counsel and, accordingly, the jury, as were the evidentiary bases that led him to that determination.

We learned earlier this year that Hartman, in fact, had determined prior to Spirko's trial in 1984 that "I concluded that Gibson had absolutely nothing to do with [the Mottinger crimes]"

and that “it defied common sense” to conclude otherwise.⁸ We also know that Hartman’s determination was no mere investigative “hunch” but was instead the thoughtful, considered determination of an experienced investigator who had spent well over a year collecting and analyzing evidence from many different sources, the review of which led him to the clear conclusion that the State’s theory that Gibson and Spirko together committed these crimes was untrue. We also now know that Hartman had claimed that he shared his determination and the underlying evidentiary support with the prosecuting attorney prior to Spirko’s trial, “[s]o anyway, I said [to the prosecuting attorney prior to trial] ‘look, [Gibson] didn’t do it...[‘] I am saying you don’t got the guy. He is not the guy,’” but that Prosecuting Attorney Keister ignored Hartman and proceeded nonetheless with a theory, evidence, and argument that Hartman had determined were untrue.⁹

It cannot be overstated how truly extraordinary this scenario actually is. The lead investigator and principal witness at trial, and indeed Spirko’s principal accuser, has now acknowledged that he believes that Spirko was convicted under a false theory, with evidence and argument that were untrue. Even more remarkably, Hartman asserts that Prosecutor Keister was informed by him of this determination and the underlying facts, and yet Prosecutor Keister chose to proceed with a theory, evidence, and argument that his principal trial witness and lead investigator was telling him were untrue.

⁸ Aff. of Thomas Hill at 2 (Exhibit 1).

⁹ Mottinger Transcript of Interview with Paul Hartman (“Mottinger Tr.”) at 5 (Exhibit 2).

It simply does not happen that an experienced law enforcement officer spends literally hundreds, if not thousands, of hours investigating a crime; determines based upon his collection and review of all the evidence that the State's theory of prosecution is untrue; informs the prosecutor of his determination; and the prosecutor decides nonetheless to proceed under that original theory, which his investigator has now informed him is untrue. Even Hartman acknowledged that he could think of no other case in which he had informed the prosecutor that the State's theory of prosecution was untrue, but that the prosecutor had nonetheless proceeded at trial under that theory.¹⁰ Undersigned counsel was an Assistant United States Attorney for many years and investigated and prosecuted hundreds of cases. At no time did an investigator ever inform counsel that a theory was untrue, but the prosecution nonetheless continued unchanged. Undersigned counsel has made the same inquiry of many other current and former prosecutors and not one could ever recall a situation in which an investigator had informed him or her that he or she had concluded based upon the complete investigation of the case that the State's trial theory was untrue, but that the prosecution nonetheless proceeded under the original theory.

The State has consistently taken the position that it is the prosecutor's ultimate decision whether to accept or reject the determination of the investigator with regard to whether the prosecution's theory of the case should be pursued. Although perhaps technically correct, it simply never happens that a prosecutor rejects the determination of the principal investigator that the State's trial theory is untrue or flawed. The Parole Board should inquire of the

¹⁰ Deposition of Paul Hartman, June 16, 2005, 110 ("Hartman Dep.") (Exhibit 3).

representatives of the Attorney General's Office if they are aware of any other situation in which a principal investigator has determined prior to trial that the State's proposed theory is untrue; has communicated that determination and the reasons therefore to the prosecutor; and the prosecutor has nonetheless decided to proceed under the original theory.

Hartman's determination that the State's theory that Spirko and Gibson together committed this crime was untrue should, in and of itself, be sufficient to create enough doubt as to the correctness, validity, and propriety of Spirko's conviction and death sentence, and should lead the Parole Board to recommend that Spirko not be executed. Perhaps, had the jury known of Hartman's determination, it would be somewhat less imperative that the jury's death sentence be overturned. However, Spirko's jury was never given the benefit of knowing that Spirko's principal accuser, Paul Hartman, the State's principal investigator and witness at trial, had concluded that the theory that was being presented to the jury was untrue. To the contrary, the jury was led to conclude that Hartman wholeheartedly endorsed the State's theory, evidence, and argument that Spirko and Gibson together committed the Mottinger abduction and murder. That jury, which convicted Spirko and sentenced him to death, was entitled to know that Hartman did not believe, based upon his thorough review of all of the evidence – none of which was available to the jury – that what Prosecutor Keister was telling the jury had occurred in fact had not occurred. This fact alone should compel the Parole Board to recommend that Spirko not be executed.

3. Extensive Evidence Establishes That Delaney Gibson Was In North Carolina, More Than Six Hundred Miles From Elgin, Up Until At Least 6:00 P.M. On August 8, 1982

Unbeknownst to Spirko's defense counsel and to the jury, the State possessed ample and conclusive evidence that had been developed by Postal Inspector Hartman that Delaney Gibson in fact was in North Carolina, 600 miles from Elgin, Ohio, as late as at least 6:00 p.m. on August 8, 1982.¹¹ Investigator Hartman had learned that Delaney Gibson and his wife Margie had been visited during the weekend of August 7 and 8 by Margie's sister and brother-in-law, Brenda and Michael Bentley.¹² Margie Gibson and the Bentleys told Hartman that this visit had occurred on August 7 and 8, 1982, and collectively they provided Hartman with fifty-two photographs taken during that weekend that showed the Bentleys and Gibsons together at locations that were confirmed to have been in North Carolina.¹³ In addition to these

¹¹ Hartman Dep. 126 (Exhibit 3); Mottinger Tr. at 5 (Exhibit 2); Aff. of Thomas Hill at 3 (Exhibit 1).

¹² Handwritten notes of Interview with Michael Bentley, December 22, 1983 (Exhibit 4); Mem. of Interview with Margie Gibson by Paul Hartman, January 12, 1984 (Exhibit 5); Mem. of Interview with Michael and Brenda Bentley by Paul Hartman, January 12, 1984 (Exhibit 6).

¹³ At the initial Parole Hearing, the State misleadingly suggested to the Parole Board that Margie Gibson's supposed failure to inform Hartman of the Bentleys August 7 and 8 visit at the time of her initial interview in April 1983 suggested that she was not being truthful when she subsequently informed Hartman in December 1983 and January 1984 about the Bentleys' visit. What the Ohio Attorney General's Office failed to inform the Parole Board was that when Margie Gibson was interviewed by Investigators in April 1983, she was not even informed that an abduction and murder had occurred in Ohio, much less that her husband was suspected of being involved. Mrs. Gibson simply believed that her husband was being arrested on his fugitive warrant; there was no reason for her to have given any thought to her husband's whereabouts on August 9, 1982. Only when Hartman

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photographs, Mrs. Gibson provided Hartman with the receipt from an automotive parts store reflecting a purchase made by Delaney Gibson in North Carolina on August 7, 1982.¹⁴

Hartman went to great lengths to confirm that the Bentleys had actually visited with the Gibsons in North Carolina on August 7 and 8, 1982. He visited the locations depicted in the photographs and determined that they were in fact in North Carolina.¹⁵ He confirmed with the two stores at which these photographs were processed that they were processed contemporaneously with the August 7 and 8 weekend.¹⁶ He went to the store indicated on the receipt and confirmed with the owner of the store that he personally had sold a part to Delaney Gibson on August 7, 1982, and that the receipt was authentic.¹⁷ Finally, he went to the motel at which the Bentleys had stayed and obtained records from the motel, and he interviewed the

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returned to interview Mrs. Gibson in December 1983, did he focus her on Delaney Gibson's whereabouts on that date. The State's suggestion to the Parole Board that any significance could be attached to her failure in April 1983 to volunteer to investigators where her husband was on August 9, 1982, when no one informed her that this date had any significance whatsoever, is simply and sadly misleading and is just one more example of the Attorney General's pattern of misleading and misrepresenting facts in its effort to secure the execution of John Spirko. Proceeding Before Parole Board, August 23, 2005; *see, e.g.*, Mem. of Interview with Margie Gibson by B.C. Pfeiffer, April 25, 1983 (Exhibit 7); Notes of Interview with Margie Gibson, January 1984 (Exhibit 4); Mem. of Interview with Margie Gibson by Paul Hartman, January 12, 1984 (Exhibit 5).

¹⁴ Hartman Dep. 122 (Exhibit 3).

¹⁵ Hartman Dep. 122-23, 129 (Exhibit 3).

¹⁶ Mem. of Interview with Jean McCall by Paul Hartman, January 12, 1984 (Exhibit 8); Mem. of Interview with Michael Seever by Paul Hartman, January 12, 1984 (Exhibit 9).

¹⁷ Notes of Inspector Hartman's Interview of Raymond Weinhauser, January 12, 1984 (Exhibit 10); Hartman Dep. 122 (Exhibit 3).

motel clerks to confirm that the Bentleys in fact stayed at the motel on the evening of August 8, 1982.¹⁸

Previously, the State has misleadingly tried to suggest to the Parole Board that there is some question as to whether the Bentleys and the Gibsons were together on the weekend of August 7 and 8 1982 in North Carolina.¹⁹ The truth of the matter is that there simply is no question that they were together. The photographs, the receipt, and the records from the motel at which the Bentleys stayed completely corroborate the Bentleys' and Gibsons' presence in North Carolina on August 7 and 8. Indeed, up until the time of argument before this Parole Board, the State had never even remotely suggested in any of its filings or oral argument before any of the courts that had considered matters relating to the significance of the State's failure to disclose this evidence that the evidence did not conclusively establish Delaney Gibson's presence in North Carolina at least as late as 6:00 p.m. on August 8, 1982. Rather, the State's argument had always focused on the absurd suggestion that Mr. Gibson could have driven the 600 miles from North Carolina to Elgin, Ohio, through the night, shaving his beard as he went, and been in Elgin at 8:30 a.m. on August 9, 1982, in time to abduct Mrs. Mottinger.²⁰

¹⁸ Mem. of Interview with Helen Shular, January 12, 1984 (Exhibit 11).

¹⁹ Proceeding Before Parole Board, August 23, 2005.

²⁰ *See, e.g.*, Respondent's Mem. in Reply to Spirko's Opp'n to Respondent's Mot. to Deny Relief from J. or in the Alternative to Limit Disc. Consistent with the Court's Disc. Order at 5; Respondent's Mot. to Den. Relief from J. or in the Alternative to Limit Disc. Consistent with Rule 60(B) at 6; Respondent's Mem. in Opp'n to Pet'r Mot. for Relief from J. at 10; Br. Pl.-Appellee on Appeal from Ct. of Common Pleas at 4; Mem. Pl.-Appellee Opposing Jurisdiction at 5; Resp. of Oh. to Pet'r First Successive Pet. to Vacate or Set Aside Sentence Pursuant to Ohio Revised Code Section 2953.21 at 4-5; Respondent's Anderson's Return of Writ to Spirko's Second Am. Habeas Corpus Pet. at

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Certainly, Inspector Hartman was absolutely convinced that Delaney Gibson had been in North Carolina at least as late as 6:00 p.m. on August 8th:

So I am not comfortable with the fact that I could put this guy at 6:00 in Camton [sic] North Carolina which is a good 650 miles from Elgin. At 6:00 the night of August 8th and these guys hit the place at 7:00 in the morning. It just doesn't make any sense to me you know not without prior contact or prior agreement.²¹

The jury was not informed that Gibson had been in North Carolina as late as 6:00 p.m. on the night of August 8, 1982. This fact alone would have presented the jury with sufficient doubt as to the truth and correctness of the State's theory that Gibson and Spirko together committed this crime, and that doubt should now compel this Parole Board to recommend that Spirko not be executed.

4. Delaney Gibson Had A Full Beard Continuously Throughout August 1982

Opal Siebert, the Elgin eyewitness who selected the photo of Delaney Gibson from a photo spread shown to her five months after the abduction, claimed to be positive that the person depicted in the photograph was the man she had seen outside the post office on the morning of August 9, 1982. As Mrs. Siebert testified: "I don't forget a face."²² Mrs. Siebert had originally

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37-38; Br. Pl.-Appellee on Appeal from Ct. of Common Pleas at 5; Mem. Pl.-Appellee Opposing Jurisdiction at 6.

²¹ Mottinger Tr. at 5 (Exhibit 2).

²² Trial Tr. at 2846 (Exhibit 12).

described the man she had seen outside the post office as clean-shaven, a description that the State has never disputed.²³

In August 1982 Delaney Gibson had a very full, dark beard.²⁴ That fact was unknown to Spirko's defense counsel and, of course, was equally unknown to the jury. Beginning in April 1983, Inspector Hartman had interviewed many of Delaney Gibson's co-workers, each of whom had reported that in August 1982 Delaney Gibson had a full beard.²⁵ Furthermore, and most significantly, Hartman had obtained fifty-two photographs from Margie Gibson and from Michael and Brenda Bentley that showed Delaney Gibson with a full beard on the weekend of August 7 and 8, 1982.²⁶ Delaney Gibson simply could not have been the man Opal Siebert saw on the morning of August 9, 1982, and her photo spread identification was mistaken. Given the fact that the mug shot that had been placed in the photo array was an old clean-shaven photograph of Delaney Gibson, it should come as no surprise that Mrs. Siebert made this mistake. Even though the State had in its possession these numerous contemporaneous photographs depicting Delaney Gibson as he appeared with a beard on the weekend of August 7 and 8, 1982, Mrs. Siebert was never asked to look at any of these photographs. Had she been shown any of these photographs, there can be virtually no doubt that she would have informed investigators that this was not the man she had seen outside the Elgin Post Office.

²³ Investigative Mem. of Thomas Strausbaugh, September 30, 1982 (Exhibit 13).

²⁴ Photographs of Delaney Gibson (Exhibit 14).

²⁵ Handwritten Notes of Inspector S.J. Wolfe, April 25, 1983 (Exhibit 15).

²⁶ Mem. of Interview with Margie Gibson by Paul Hartman, January 12, 1984 (Exhibit 5); Mem. of Interview with Michael and Brenda Bentley by Paul Hartman, January 12, 1984 (Exhibit 6); Photographs of Delaney Gibson (Exhibit 14).

Cynically and misleadingly, the State has consistently taken the position that Delaney Gibson could have driven from North Carolina during the night of August 8, 1982, shaving as he went, and arrived in Elgin, Ohio, in time to be the clean-shaven man Opal Siebert saw at 8:30 a.m. on the morning of August 9, 1982. Not only is this a preposterous and contrived explanation to try and salvage Opal Siebert's eyewitness identification, but it is actually completely belied by the factual record developed by Hartman. Gibson's co-workers had described him as continuously bearded *throughout* the August 1982 timeframe. As Hartman acknowledged, although theoretically one could shave one's beard in a matter of minutes, it would take weeks to grow it back, and therefore the State's cynical "shaving theory" finds absolutely no support in the entire record.

Opal Siebert's mistaken identification is no small matter in the context of this entire record. In a case with no forensic, scientific, or physical evidence of any kind, and lacking any positive eyewitness identification of John Spirko, the State relied heavily in its closing argument on Opal Siebert's absolutely positive identification of Delaney Gibson, which, coupled with the State's evidence of the friendship between Spirko and Gibson, supplied the missing corroborating evidence that the State clearly felt it needed in order to obtain a conviction of John Spirko:

Now, the defense is going to say that Mark Lewis was seventy percent sure; and as a representative of the State of Ohio, I am not going to come up here and say that seventy percent is beyond a reasonable doubt. You know that's silly; I know that's silly. If that were the only thing that we were looking at, but you have to take that identification in conjunction with all of the statements the Defendant has made, the pretrial confessions, the total picture, *and with the identification that Opal Siebert made.*

Opal Siebert said this was the man that was there that I saw. She put that in a drawing, and there is the side view of the man that she

saw with the hair combed down with the dark eyebrows, with the dark hair, with the thin face. *This is a picture of Delaney Gibson.* There is a profile of Delaney Gibson.

I submit to you it is almost as if the person who made this drawing back on August 11, 1982, had this picture from which to make the drawing. You make the comparison. That identification is there. Delaney Gibson was there that morning, and he had a blue shirt on, and he had the dark eyebrows and the dark hair

Now, take Mark's identification, take the fact that these two were the most important persons to each other, the best friends in the whole world, and put that all together as a package²⁷

Delaney Gibson's involvement was therefore inexorably part of the State's case against John Spirko. We now know that this positive eyewitness identification was mistaken; that Paul Hartman knew it was mistaken; that he claims to have told Keister that Gibson had no involvement whatsoever in the Mottinger crime; but that, nonetheless, the prosecution proceeded with the theory that Gibson indeed was Spirko's accomplice; and used Opal Siebert's "positive" mistaken eyewitness identification of Gibson to convict John Spirko.

Had the jury known that, in fact, Delaney Gibson was fully bearded – indeed had Opal Siebert known that Delaney Gibson wore a full beard – the jury would have reached a completely different conclusion. Under these circumstances, based upon the State's reliance on this untrue and mistaken evidence alone, this Parole Board should recommend that Spirko's execution not be allowed to proceed.

²⁷ Trial Tr. at 3755-57 (Exhibit 16) (emphasis added).

5. Work Records Reflect That Delaney Gibson Was Picking Tomatoes on August 10, 1982

Unbeknownst to the jury, Paul Hartman had discovered that work records of Delaney Gibson's employer reflected that Delaney Gibson was picking tomatoes in North Carolina on August 10, 1982.²⁸ As migrant tomato pickers, Margie and Delaney Gibson would turn in "tickets" reflecting the volume of tomatoes picked each day, which were used to determine their compensation. Paul Hartman learned that because Delaney Gibson was a fugitive from justice, Margie Gibson preferred to turn in the tickets collected by both her and Delaney Gibson together to avoid Delaney Gibson's name from appearing in the work records. The records for August 10, 1982, the day after Mrs. Mottinger's abduction in Elgin, reflect that Margie Gibson had turned in tickets showing a volume of tomatoes picked on that date consistent with a volume which would have been achieved by two people.²⁹

This evidence led Hartman to conclude that Delaney Gibson, in fact, was picking tomatoes in North Carolina on August 10. This was one of the pieces of evidence that ultimately lead Hartman to the determination that Delaney Gibson had absolutely no involvement whatsoever in the Mottinger crimes.³⁰ Nonetheless, this evidence was not shared with defense counsel and was also concealed from the jury. This evidence standing alone, and certainly in

²⁸ Handwritten Notes of Inspector Hartman's Interviews with Juan Flores and Juan Valdez, April 22, 1983, at 3 (Exhibit 18).

²⁹ *Id.*

³⁰ *See e.g.*, Mottinger Tr. at 5 (Exhibit 2); Paynter Transcript of Interview of Paul Hartman ("Paynter Tr.") at 105 (Exhibit 19); Aff. of Thomas Hill at 2 (Exhibit 1).

combination with other undisclosed evidence concerning Delaney Gibson's whereabouts and appearance, gives rise to unmistakable doubt about the State's theory and evidence upon which John Spirko was convicted and sentenced to death. That doubt must be manifested in a recommendation by this Parole Board that Spirko's execution not be allowed to proceed.

6. The State's Failure To Establish Any Contact Between Spirko And Gibson Prior To August 9, 1982, Renders The State's Theory Of Prosecution False

Postal Inspector Hartman correctly concluded that it made absolutely no sense that Gibson and Spirko somehow randomly met in the tiny, remote hamlet of Elgin, Ohio, far from the places either was living at the time, without some prior planning.³¹ Inspector Hartman further correctly concluded that there would be no reason for anyone to plan to rob this tiny rural post office without some prior contact or association with Elgin or that particular post office.³² To conclude otherwise, in Hartman's words, "defied common sense."³³ As Hartman said: "it just doesn't make any sense to me you know not without prior contact or prior agreement."³⁴

Delaney Gibson was working as a migrant tomato worker with no access to his own telephone. Inspector Hartman was able to discover the various pay telephones in the area of the migrant farm that were used by Delaney Gibson. Inspector Hartman was also aware that Spirko had been living with his sister in Swanton, Ohio, and had developed a relationship with Luann

³¹ Hartman Dep. 101-02 (Exhibit 3); Mottinger Tr. at 5 (Exhibit 2); Aff. of Thomas Hill at 2-3 (Exhibit 1).

³² Mottinger Tr. at 5 (Exhibit 2).

³³ Aff. of Thomas Hill at 2 (Exhibit 1).

³⁴ Mottinger Tr. at 5 (Exhibit 2).

Smith, his new girlfriend, also in the Swanton area. Accordingly, Hartman subpoenaed telephone records from all of these various telephones in an effort to establish any communication or contact between Spirko or Gibson that could have led to their meeting in Elgin or their agreement or planning to rob the Elgin Ohio Post Office.³⁵ Hartman found absolutely no evidence of any contact whatsoever between the two men.³⁶

This failed effort by investigator Hartman to establish contact between these two men was one of the significant factors that led him to conclude, as he asserts he told Prosecuting Attorney Keister, that Gibson had no involvement whatsoever in the Mottinger crimes.³⁷ Yet none of this evidence and none of these efforts were ever disclosed to defense counsel, and again, the jury was never aware of these facts. The jury's awareness of these facts and Hartman's expert conclusion that the Mottinger crime necessarily must have been preceded by contact between the people responsible for the crime would have again lead the jury to have very real and reasonable doubts about the State's theory of prosecution and about Spirko's guilt. The absence of any contact between Spirko and Gibson helped lead Hartman to the determination that the State's theory of its case was untrue and should equally lead this Parole Board to conclude that there are far too many doubts to allow Spirko's execution to proceed.

³⁵ Hartman Dep. 101-02 (Exhibit 3); Mottinger Tr. at 5 (Exhibit 2).

³⁶ *Id.*

³⁷ Mottinger Tr. at 5 (Exhibit 2).

7. Keys Left At The Scene Of The Elgin Post Office By The Perpetrators Of These Crimes Could Not Be Linked To Either Spirko Or Gibson

We now know that that a set of keys, including a key to a Ford automobile, a post office box key, and a house key, apparently were recovered from the scene of the Elgin Post Office on the morning of the abduction.³⁸ Curiously, there is no mention of any keys having been recovered from the scene in any of the investigative memoranda that were made available to defense counsel. Yet again, as a result, the jury never learned of this critical evidence. Inspector Hartman recently testified regarding the investigative significance that he ascribed to this evidence.³⁹

Inspector Hartman reasoned that these keys had been inadvertently dropped by the perpetrators of the crime. In fact, Inspector Hartman concluded that Mrs. Mottinger's body had ultimately been rolled and unrolled in the shroud in which it had been recovered in a failed effort by the perpetrators of the crime to find the keys they had lost. Hartman first determined that these keys did not belong to anyone in Elgin. He then tried to link them to either Spirko or Gibson and was unable to do so. In fact, Hartman went to the effort of obtaining a search warrant for a Ford truck owned by Gibson to see if the Ford automobile key that had been recovered matched the truck. It did not.⁴⁰

³⁸ Hartman Dep. 75 (Exhibit 3).

³⁹ Hartman Dep. 182 (Exhibit 3).

⁴⁰ Hartman Dep. 180-81 (Exhibit 3).

In addition, Hartman had significant investigative interest in the fact that one of the abandoned keys was for a post office box.⁴¹ Hartman reasoned that this might well indicate that the perpetrators of the Mottinger crime had some prior connection with postal crimes, and Hartman made great efforts to try and determine which post offices in the multi-state area surrounding Elgin might have had post office boxes to which the key fit.⁴² Indeed, years later, Hartman developed an additional suspect, James Clark Kelley, who had a history of participating in post office crimes and who lived in Madison, Indiana, one of the towns that had a post office box that the missing key could have fit.⁴³ But significantly for purposes of Spirko's case, none of these keys, despite Hartman's considerable efforts, could ever be linked to Gibson or Spirko, and neither Gibson nor Spirko had any prior history of participating in postal crimes.

This evidence became yet another one of the bases upon which Hartman determined that in fact Gibson had absolutely nothing to do with the Mottinger crimes. As with all the other evidence, this evidence was not made available to defense counsel and was, as a result, not available for the jury to consider as it determined Spirko's guilt and ultimate death sentence. This evidence, in combination with all the other evidence and, particularly, in combination with the other undisclosed evidence, casts considerable doubt on whether the jury, had it been presented with this evidence, would have convicted and/or sentenced Spirko to death. Accordingly, the Parole Board must conclude that there is too much doubt of Spirko's guilt to allow his execution to proceed.

⁴¹ Hartman Dep. 182 (Exhibit 3).

⁴² Hartman Dep. 182-85 (Exhibit 3).

⁴³ Mottinger Tr. at 7-10 (Exhibit 2).

8. Opal Siebert's Identification Of Delaney Gibson Was Completely Mistaken

As previously indicated, Opal Siebert described a clean-shaven man as the person she saw outside the Elgin Post Office on the morning of August 9, 1982. The man was clean-shaven in her description and was clean-shaven in the police artist's sketches that were created with her help.⁴⁴ As we now know, Delaney Gibson had a very dark and full beard. In addition, Opal Siebert described the person she saw as wearing glasses, and Delaney Gibson has never worn glasses.

It is also noteworthy, that in her initial description, given on August 9, 1982, Mrs. Siebert described the man she saw as 6'2" or 6'3", in his late 40s to early 50s.⁴⁵ Delaney Gibson in fact is 5'8" and in 1982 was 31 years old.⁴⁶

⁴⁴ Police Sketches of Suspect (Exhibit 20).

⁴⁵ Investigative Mem. of Thomas Strausbaugh, September 30, 1982 (Exhibit 13).

⁴⁶ Before the Parole Board, the State argued vigorously that Opal Siebert's eyewitness testimony should be credited because she described the perpetrator's hands as pale, and there was some evidence to suggest that Delaney Gibson wore gloves while he worked in the fields picking tomatoes. The Attorney General argued strenuously that this was a particularly unusual thing for a witness to note and should be given great weight. It is extraordinarily curious to note, however, that Mrs. Siebert does not appear to have mentioned anything about pale hands in any of her initial descriptions to investigators in August 1982. If this had been such a significant and certain observation by Mrs. Siebert, one would have expected it to be reflected in the descriptions given originally by Mrs. Siebert. Indeed, Mrs. Siebert described the man as having "¾ length sleeves" or a shirt that was "long sleeved with the sleeves partially rolled up" with no mention of the color of his hands or arms. Given what we now know was the apparent willingness of investigators in this case to suggest facts to witnesses, one can only assume that if Mrs. Siebert said anything at all about the color of the man's hands she saw at a considerable distance across the street, it would only have been at the suggestion of whomever was asking her the question. Mrs. Siebert was located approximately 60 yards from the man she saw, and to suggest that this elderly woman noticed anything about the color of this

(Continued on following page)

It is also significant to note that when Mrs. Siebert was shown the photo spread and asked to make an identification some five months after she had last seen the perpetrator, she was first allowed to review the description that she had given, and she was shown the police sketches that she had helped create.⁴⁷ Both Inspectors Hartman and Strausbaugh testified that this was not preferred police procedure and that a witness' recollection should not be refreshed in this way prior to being asked to make an identification.⁴⁸ This is all the more reason why Mrs. Siebert's photo spread identification should not be credited.

Finally, as has been previously noted, Mrs. Siebert was never shown any of the many photographs that the State possessed and the defense did not know existed that depicted Gibson as he actually appeared on August 7 and 8 1982.⁴⁹ There can be no doubt that had she been shown any of these photographs, Mrs. Siebert would have told investigators that this was not the man she saw on the morning of August 9, 1982. This jury should never have heard Mrs. Siebert's positive eyewitness identification of Delaney Gibson. The State desperately needed a positive eyewitness identification to corroborate its flawed theory, especially given its complete and utter lack of physical or forensic evidence tying either Spirko or Gibson to these crimes. The

(Continued from previous page)

man's hands at that distance defies common sense, especially when the State is also presumably arguing that one should ignore the fact that Delaney Gibson is 6 or 7 inches shorter than the man Opal Siebert described, was 20 years younger, did not wear glasses, and had a full beard, all very much unlike the man Mrs. Siebert described. (Supplemental Exhibit 19).

⁴⁷ Mem. of Inspector Strausbaugh, February 9, 1983 at 3 (Exhibit 21).

⁴⁸ Hartman Dep. 388 (Exhibit 3); Deposition of Thomas Strausbaugh, 89 (Exhibit 22).

⁴⁹ Discovery Stipulation, March 13, 1984 (Exhibit 17).

State should never have been in the position of being able to argue to the jury the significant corroborating effect of Mrs. Siebert's positive "I never forget a face" identification of Delaney Gibson coupled with his friendship with John Spirko. On this basis alone, this Parole Board should conclude that there is far too much doubt about Spirko's guilt to allow his execution to proceed.

9. By Accepting Hartman's Determination That The State's Theory That Gibson And Spirko Together Committed The Mottinger Crimes Was Untrue, The State Would Have Been Left Without Any Theory Of Its Case To Argue To The Jury

Had the State accepted Paul Hartman's reasoned determination that the Gibson/Spirko theory was untrue, the State would have lost much more than Opal Siebert's positive eyewitness identification. Obviously, as has been shown previously, if a fully bearded Delaney Gibson was in North Carolina both shortly before and shortly after the August 9, 1982 abduction; if there was no evidence whatsoever of any contact between Spirko and Gibson prior to the abduction; if the keys that had been recovered from the scene of the Elgin Post Office could not be linked to either Spirko or Gibson; and if there was no forensic or scientific evidence of any kind linking either Spirko or Gibson to the Mottinger crimes, Opal Siebert's subsequent photo spread eyewitness identification could not have stood. At that point there would have been no corroboration whatsoever of the Gibson/Spirko theory. More importantly, however, John Spirko's twelfth and final oral statement to Paul Hartman – that Delaney Gibson had been responsible for the Mottinger crimes – would have been shown to have been every bit as much a lie as Spirko's prior eleven statements, and the State would have been left completely at loose ends, without any theory of how the Mottinger crime occurred.

At trial it is fundamentally necessary to be able to explain to the jury how the crime occurred and what role the defendant is alleged to have played in the commission of that crime. If Hartman's determination that the Gibson/Spirko theory of the case was untrue had been given the proper credit, or at least if it had been shared with the defense, the State would have been left without any explanation to offer to the jury as to how this crime occurred.

Beginning in October 1982, John Spirko had told Paul Hartman a series of stories about the Mottinger crime in an effort to curry favor for himself and his girlfriend, who were both facing criminal prosecution for Spirko's failed escape attempt; Spirko was facing serious parole revocation proceedings as well. Over the ensuing 2½ months, Spirko met with Hartman many times, presenting ever-changing stories and each time attributing his knowledge of the facts concerning the Mottinger case to a continuously changing cast of characters identified mostly by nicknames. After each story, Paul Hartman went out and investigated and determined that Spirko was lying to him and that the people Spirko was claiming had involvement in the Mottinger crime, in fact, did not.⁵⁰ Hartman himself testified at Spirko's trial that after each story he went out and investigated the persons identified and determined that each person had no involvement in the Mottinger crime.⁵¹ Finally in January 1983, after prompting from Hartman, who suggested the name of "Bear Branch Kentucky," the tiny home town of Spirko's former cellmate, Delaney Gibson, Spirko parroted right back to Hartman that in fact it was Delaney Gibson who was responsible for the Mottinger crime and that he had been protecting Delaney Gibson, his only real friend in the whole world. It was at this point, beginning in early 1983, that

⁵⁰ Hartman Dep. 72-73 (Exhibit 3).

⁵¹ Trial Tr. at 2457 (Exhibit 23).

Hartman commenced his investigation of Delaney Gibson, which ultimately led him to the determination a year or so later that Delaney Gibson had no more involvement in the Mottinger crimes than any of the other characters mentioned by Spirko during the first eleven interviews.

At that point, the State should have gone back to the drawing board and continued its investigation to determine what actually happened to Mrs. Mottinger. Instead, the State, already committed to the Spirko/Gibson theory, decided to ignore, bury, and conceal the evidence and the determination that this scenario was just as flawed as Spirko's prior stories to Hartman and proceeded to try Spirko under this false and mistaken theory. Had the State done what it should have done and abandoned the Spirko/Gibson theory – or at a minimum disclosed to the defense Hartman's determination that the theory was untrue and disclosed all the evidentiary bases that had led him to the conclusion – the State would have been left without any theory to present to the jury.

A prosecution without a theory is no prosecution at all, and any jury presented with a case without a theory would have had sufficient doubt to cause it not to convict, and at the very least not to send the defendant to his death. Under these circumstances, when the State in effect had no viable theory of prosecution yet proceeded under an erroneous theory, knowing it to be untrue and flawed, this Parole Board should recommend that Spirko's execution be halted.

10. The State Of Ohio Has Never Had Any Intention Of Prosecuting Delaney Gibson For The Mottinger Crimes Delaney Gibson was indicted along with John Spirko in September 1983 and also charged with the capital murder of Betty Jane Mottinger.⁵² Yet the State kept that capital

⁵² Indictment of Delaney Gibson, September 13, 1983 (Exhibit 47).

indictment open for over 20 years, finally dismissing it on May 17, 2004.⁵³ Indeed, it is now quite apparent that the State had never had any intention of prosecuting Delaney Gibson but only used his indictment to maintain a veneer of legitimacy for its theory of prosecution of John Spirko.

Even though Delaney Gibson had been charged in a capital indictment, the Van Wert County Prosecutor allowed him to be returned to Kentucky in 1983 to face non-capital charges there, while retaining jurisdiction over John Spirko.⁵⁴ Of course, Spirko was also wanted on non-capital parole revocation charges in Kentucky, yet he was kept in Ohio to face his capital trial. Conveniently, this left Spirko to be tried alone. With Gibson absent, it became possible to conceal all of the evidence Inspector Hartman had collected that had led Hartman to determine that Gibson had nothing whatsoever to do with the Mottinger crimes. With Gibson absent, the State was free to use evidence against Gibson, particularly the positive eyewitness identification of Opal Siebert, and bootstrap that evidence into the conviction of Spirko. With Gibson absent, Opal Siebert never laid eyes on the man whose older photograph she had identified and, just as she had never been shown the contemporaneous photographs of Delaney Gibson, never was asked to make an in-person identification of Delaney Gibson. There can be very little doubt today that had Opal Siebert been asked to make this identification, she would have testified that Gibson was not the man she saw outside the Elgin Post Office.

Having allowed Gibson to be returned to Kentucky to face non-capital charges, one would have assumed that the Van Wert County prosecutors would have lodged a detainer against

⁵³ *Nolle Prosequi* for Delaney Gibson, Jr., Case No. CR 83-09-071, May 17, 2004 (Exhibit 48).

⁵⁴ Report of Postal Inspector T. Strausbaugh, May 11, 1984 (Exhibit 50).

Gibson to ensure his eventual return to Ohio to face these capital charges. Yet no detainer was ever lodged and, eventually, Delaney Gibson was released not once, but twice, from custody in Kentucky while capital charges remained outstanding in Van Wert County. As far as can be determined, Delaney Gibson thus became the only man in American capital jurisprudential history to be charged with a capital crime, to be available for trial, and to have the State simply not proceed against him.

Once the previously undisclosed and concealed evidence that had led Hartman to his determination that Gibson was not involved in the Mottinger crimes became known to Spirko's counsel, counsel repeatedly asked the State to declare its intentions with respect to the still open capital indictment of Delaney Gibson. The State steadfastly refused to do so. We now know that while Spirko's habeas counsel was repeatedly asking this question of the State, Charles Kennedy, the Van Wert County Prosecutor, had determined to dismiss the open capital indictment against Delaney Gibson.⁵⁵ Yet even then, the dismissal did not occur.

It was only after Connie Mottinger had gone to Kennedy and told him that Paul Hartman was now speaking and that Hartman had told her that he had concluded prior to Spirko's trial that Gibson had absolutely nothing to do with the Mottinger crimes, that Kennedy finally decided that he needed to do on the record what he had concluded years earlier should be done. On May 17, 2004, the very same day the Sixth Circuit affirmed the denial of Spirko's Habeas Petition, and less than a month after Connie Mottinger had come to speak with him, Charles Kennedy finally dismissed the Gibson capital indictment that had been pending for over 20 years

⁵⁵ Deposition Transcript. of Charles Kennedy, June 14, 2005, 40, 66-67 (Exhibit 49).

because, according to Kennedy’s testimony, “[it] just happened to be a relatively quiet morning.”⁵⁶

It is as clear as can be that the State never had any intention of prosecuting Delaney Gibson, just as lead investigator Paul Hartman had determined and recommended prior to the Spirko trial. The State’s willingness to send Gibson to Kentucky to face non-capital charges; the State’s failure to lodge a detainer against him that would have required that he be brought back to Ohio to face his capital indictment; the State’s willingness to have Mr. Gibson released from custody in Kentucky; and the State’s eventual dismissal of Gibson’s capital indictment – all make it abundantly clear that the State has always understood that Gibson in fact had nothing whatsoever to do with the Mottinger crime. What better evidence could there be that the State’s theory advanced to the jury at Spirko’s trial – that Spirko and Gibson together committed the Mottinger crime – was untrue than the State’s actions with respect to the Gibson capital indictment? Under these circumstances, the Parole Board must understand, just as Hartman has recently acknowledged, that the Spirko/Gibson theory of prosecution was untrue, and the jury’s conviction and sentence of death were accordingly based upon a false and untrue theory of prosecution. Spirko cannot be executed under these circumstances.

11. The State Cannot Execute Spirko Based On His Alleged Knowledge Of The Crime Because His Motive And Willingness To Lie Require Greater Corroboration Of His Statements

The State has asserted time and again that whether Delaney Gibson was involved and, indeed, whether the prosecution believed Delaney Gibson was involved does not matter because

⁵⁶ *Id.*, 66-67 (Exhibit 50).

its case rested almost exclusively on the numerous oral statements Spirko allegedly made to Inspector Hartman in which Spirko allegedly indicated his awareness of details of the crime that allegedly were not public knowledge.⁵⁷ For a number of independent reasons, Spirko's conviction and death sentence cannot rest on his alleged statements.

There is no dispute that when Spirko first asked to speak with investigators in late October 1982, he had a motive to lie about his knowledge of the Mottinger crime. His attempt to break out of jail was unsuccessful, and in the process he had assaulted a guard, which placed him at serious risk of facing parole revocation and substantial additional time in Kentucky and additional time in Ohio for his failed jailbreak and assault. In addition, his girlfriend Luann Smith, who had never before been in trouble, was now facing charges for assisting him with his attempted escape. Spirko, a name completely unknown to investigators, was clear with authorities that he was contacting them to seek leniency for himself and for his girlfriend.

There also is no dispute that Spirko lied repeatedly about what he allegedly knew about the Mottinger crime. Each of Spirko's first eleven statements to investigators was a lie. When confronted by authorities who had investigated each one, Spirko admitted that he had lied but then lied again by asserting that his next story would be true. After each false story,

⁵⁷ The federal court adopted the State's argument in its Order dismissing Spirko's petition. *Spirko v. Anderson*, No. 3:95CV7209, 2000 U.S. Dist. LEXIS 13182, at **2-3, 18-19 (N.D. Ohio July 11, 2000).

investigators should have been more and more suspicious of Spirko's claim that he knew who committed the Mottinger crime.⁵⁸

We have set forth already that Spirko's twelfth statement to investigators was just as much a lie as his previous eleven, which is reason enough alone to doubt the validity of his conviction and death sentence. In addition, and quite significantly, Spirko made many other statements to investigators that were flat wrong and that should have caused investigators to question whether Spirko indeed knew anything about the Mottinger crime and that now should create considerable doubt concerning Spirko's conviction and death sentence.

For example, Spirko stated that Mrs. Mottinger had been stabbed in the front and the back,⁵⁹ but she in fact had been stabbed only in the front. Spirko called Mrs. Mottinger a "fat bitch,"⁶⁰ but she in fact weighed just over 100 pounds.⁶¹ Spirko described the material wrapped around Mrs. Mottinger's body as a "gray curtain" that was made of a heavy "canvas type material." In fact, the consistent testimony was that the material was a painter's drop cloth that was covered with paint smears and spots. Spirko, moreover, never stated that the cloth had any paint on it. Indeed, when Spirko claimed he could provide to investigators basic information concerning the crime that the killer should know and that investigators did not know – such as

⁵⁸ Statement of William Latham at John Spirko Clemency Hearing, August 23, 2005 (Exhibit 44); Letter from Professor Steven Drizin to Governor Bob Taft and Ohio Parole Board, August 16, 2005 (Exhibit 43).

⁵⁹ See Typed Notes of Spirko Interview, State Exhibits 105 and 106 (Exhibit 37).

⁶⁰ Trial Tr. at 2432 (Exhibit 38).

⁶¹ Lima News *Clues Sought in Abduction of Postmistress*, August 10, 1982 (Exhibit 34).

the location where the murder occurred – investigators concluded the information he attempted to provide was false.⁶²

Accordingly, there was every reason for investigators to doubt Spirko's stories. Yet the evidence demonstrating that Spirko was completely wrong about many of the facts that the killer should have known was never presented to the jury. Indeed, as Spirko has long acknowledged, his own testimony, presented as a misguided effort to respond to the State's lies, was completely false. Lying, however, is not a capital offense.

12. The State Cannot Execute Spirko Based On His Statements Because It Was The State That Suggested To Spirko That Gibson Was Involved

After eleven demonstrably false statements concerning the Mottinger crime, and in light of the undeniable fact that Spirko had a compelling motive to make investigators believe that he knew about the Mottinger crime, investigators should have been wary of anything Spirko tried to tell them regarding the Mottinger crime. Certainly they should not have been suggesting to Spirko who committed the Mottinger crime. But that is exactly what they did.

In all of his many stories, Spirko never mentioned the name "Delaney Gibson." Inspector Hartman, however, had become aware that Spirko and Gibson had been cell mates at one time in Kentucky and that Gibson was from a tiny settlement by the name of Bear Branch, Kentucky. On January 11, 1983, Hartman interviewed Spirko for the twelfth time. Up to this point, each and every person whom Spirko had mentioned in prior interviews as having involvement in the

⁶² Notes of Interview of John Spirko by Paul Hartman, December 13, 1982, at 3 (Supplemental Exhibit 5).

Mottinger crime had been investigated and cleared by Hartman. Hartman then made a suggestion to Spirko, as reflected in his investigative memorandum:

Further, in the course of general discussion, vague references were made *by me* to the community of Bear Branch, Kentucky. Spirko reacted to such references by smiling and continued to bring the community of Bear Branch, Kentucky, into the conversation. Ultimately, Spirko brought forth the name of Lanney Gibson and related personal details concerning members of Gibson's family, including Gibson's wife and brothers.⁶³

Hartman now acknowledges, as his memorandum makes clear, that it was he who introduced the subject of Bear Branch and, accordingly, Gibson.⁶⁴ Spirko seized upon Hartman's suggestion and identified Gibson, "the only friend he has ever had," as the source of his information about the Mottinger crime and told Inspector Hartman that it was Gibson – along with certain other characters he had mentioned to Hartman in earlier interviews – who had committed the Mottinger crime.

Investigators then set out to determine whether Gibson really was involved in the Mottinger crime. They discovered one eyewitness who had never seen Gibson before but who identified him as the man she saw outside the post office from a years-old photograph showing him without a beard. They also discovered a mountain of corroborated evidence from witnesses who lived and worked with Gibson every day demonstrating that Gibson could not have been involved in the Mottinger crime.

⁶³ Mem. of Interview of John G. Spirko by Paul Hartman, January 11, 1983, at 1 (emphasis added) (Exhibit 24).

⁶⁴ Hartman Dep. 84 (emphasis added) (Exhibit 3).

Spirko, though, believing the State's suggestion that Gibson was involved and wanting to show that he could help the State solve the Mottinger crime, stuck with the Gibson story even though he had not seen Gibson for over a year prior to the date the Mottinger crime was committed and even though Gibson in fact had nothing to do with the Mottinger crime. And, as we now know, the State also stuck with the Gibson story before the jury even though it knew it to be false. It therefore is not surprising that in response Spirko too stuck with the false Gibson story at trial. Again, lying is not a capital offense.

13. The State Cannot Execute Spirko Based On His Statements Because Spirko Never Produced Any Evidence That The State Did Not Already Have

Given that Spirko had a strong motive to lie and had demonstrated time and again a willingness to lie, investigators should have been pressing Spirko to produce evidence that they had been unable to find in order to demonstrate that he in fact had actual knowledge of the Mottinger crime. Apparently investigators did press Spirko to produce such evidence, but Spirko failed and was unable to do so because he did not have any information. Indeed, the information Spirko allegedly provided was all information *the State already possessed*. *The State does not assert otherwise.*

In the absence of any forensic or physical evidence linking Spirko or Gibson to the crime, investigators would have wanted Spirko to lead them to some physical evidence that could be evaluated for that missing link. Investigators had uncovered no murder weapon, but Spirko could not lead them to one. Investigators had not identified the car used for the abduction, but Spirko could not help them find it. Investigators did not know where the murder had occurred,

but Spirko could not help them.⁶⁵ Common sense, an experienced Ohio investigator,⁶⁶ and an expert who has studied alleged false confessions,⁶⁷ all make clear that Spirko's inability to produce any evidence that the State did not already possess – particularly when he had a strong motive to convince investigators that he knew who committed the Mottinger crime – leaves very strong doubts as to whether Spirko indeed was involved with the Mottinger crime.

14. The State Cannot Execute Spirko Based On His Statements Because Serious Doubts Now Exist As To Whether Spirko Told Investigators Details About The Mottinger Crime That Were Not Public Knowledge

In the face of allegations that it withheld documents and presented a false case at trial, the State has time and again returned to its argument that Spirko's conviction rests on critical facts about the murder that he allegedly provided to investigators that were not public knowledge.

According to the State, those details include the following:

- a. the location of Betty Jane's stab wounds.
- b. an exact description of Betty Jane's clothing.
- c. knowledge that a stone was pried from a ring worn by Betty Jane.
- d. a description of Betty Jane's ring.

⁶⁵ Spirko claimed he could identify the location where the murder occurred, but he could not. Notes of Interview of John Spirko by Paul Hartman, December 13, 1982, at 3, (attached hereto as Supplemental Exhibit 5).

⁶⁶ Statement of William Latham at John Spirko Clemency Hearing, August 23, 2005 (Exhibit 44).

⁶⁷ Letter from Professor Steven Drizin to Governor Bob Taft and Ohio Parole Board, August 16, 2005 (Exhibit 43).

- e. the method used to dispose of Betty Jane's body including the type of shroud used and the specific method by which Betty Jane was wrapped in the shroud.
- f. an exact description of Betty Jane's purse into which the fruits of the robbery were placed and removed.
- g. an accurate accounting as to what was stolen from the Elgin, Ohio Post Office.

We now know that serious doubts exist as to whether Spirko indeed told investigators details that were not public knowledge. Most of the details that the State has represented as not generally known by the public were, in fact, in news reports at the time of the Mottinger crime and prior to the time Spirko allegedly provided the details to investigators. In addition, Hartman has certainly demonstrated his willingness and ability to introduce subjects to Spirko only to have Spirko parrot them back as supposed fact. Just as Hartman has now acknowledged introducing Delaney Gibson into his discussion with Spirko by dropping the name "Bear Branch," details that may not have been in press reports may well have been provided to Spirko by Hartman himself or may not have ever been part of Spirko's statements to Hartman, Hartman's testimony and recent statements notwithstanding. After all, even the State concedes that Spirko never told Hartman anything that Hartman did not already know. These matters bear careful scrutiny.

The location – and even the number – of stab wounds on Mrs. Mottinger's body had been reported in the press.⁶⁸ A description of the clothing Mrs. Mottinger had been wearing when she

⁶⁸ Jack A. Seamonds, *Elgin Postmistress Mourned As Agents Search Crime Scene*, The Times-Bulletin, September 21, 1982 ("Officials say Mrs. Mottinger was stabbed in the chest at least 13 times.") (Exhibit 25); *Material Could be Key to Elgin Case*, The Lima News, October 21, 1982 ("She had been stabbed at least 13 times.") (Exhibit 35).

was abducted had been reported.⁶⁹ The type of fabric the body was wrapped in as well as a description of the way the body was wrapped had been reported in the press.⁷⁰ What was stolen from the Elgin post office had been reported in the press.⁷¹

Just like “Bear Branch,” details that may not have been reported in the press likely were supplied by Hartman, not Spirko. Perhaps the most critical of these is the matter of the pried stone. Spirko has maintained consistently – from his trial testimony through his interview with the Parole Board – that he learned of the pried stone (and many other details of the crime) from Hartman.⁷² Of course there is no question that Spirko lied to investigators and at trial, so it is

⁶⁹ *Clues Sought in Abduction of Postmistress*, Lima News, August 10, 1982 (“Mrs. Mottinger was wearing a light colored blouse with a design on the front and dark slacks...”) (Exhibit 34); *Postmistress Missing, Abduction is Feared*, Toledo Blade, August 10, 1982 (Exhibit 33).

⁷⁰ Jack A. Seamonds, *Elgin Postmistress Mourned as Agents Search Crime Scene*, Times-Bulletin, September 21, 1982 (“Authorities said there were two cinder blocks wrapped in the tarp with the body...”) (Exhibit 25); *Body of Mrs. Mottinger Found*, Times-Bulletin, September 20, 1982 (“Mrs. Mottinger’s body was found wrapped in a painter’s tarp bound with a cord and silver duct tape.”) (Exhibits 31 and 32); *Material Could Be Key to Elgin Case*, Lima News, October 21, 1982 (The crime lab “has identified the cloth as a ‘very expensive theatrical type backdrop curtain’ Investigators first thought the postmaster’s body was wrapped in a painter’s tarp because of paint splatterings on the material.”) (Exhibit 35). Indeed, when prosecutors asked Spirko at trial how he knew about the torn curtain, Spirko testified that “I believe I read that in the paper.” (Trial Tr. at 3575) (Exhibit 30).

⁷¹ Jack A. Seamonds, *Elgin Residents Shocked Over Abduction of Postmistress*, Associated Press, August 11, 1982 (Exhibit 29); *Untitled*, United Press International, August 10, 1982 (Exhibit 28); *Clues Sought in Abduction of Postmistress*, Lima News, August 10, 1982 (Exhibit 34); *Reward Money Hiked in Elgin Post Office Case*, Times-Bulletin, August 11, 1982 (Exhibit 27); *Hypnotist Helping in the Case of Missing Postmistress*, Associated Press, August 12, 1982 (Exhibit 26).

⁷² Trial Tr. 3550, 3563 (Supplemental Exhibit 3).

important to examine Hartman's actions carefully, and how information made its way into Investigator Hartman's notes raises serious questions.

The allegedly critical detail of the pried stone appears only at the very end of Hartman's notes from an interview he conducted of Spirko on Dec. 9, 1982, under a heading labeled "Miscellaneous info." The notes indicate that Spirko suddenly blurted out that "Rooster" had pried a stone loose from one of Mrs. Mottinger's rings after killing her. As reported in the *Cleveland Plain Dealer*,

that information was obviously known by investigators as well. And that's exactly where Spirko testified he got it -- during hours of give-and-take chatter with Hartman. "I will never forget the exact words he used," Spirko said of Hartman, during his trial testimony. "I gave him a couple of fictitious names. And he says, The one I want to get a hold of . . . [is] that stinkin' son-of- a-bitch that pried that stone out of her ring. That's the first time I heard anything about a ring."⁷³

There are other alleged critical details that it appears Hartman added to his notes after his interviews of Spirko. With respect to the clothing Hartman asserted Spirko described to him, it is clear from Hartman's notes that the description of the clothing, "dark slacks, light yellow blouse, button front, print design" was added after the original notes were written, and in a different handwriting style.⁷⁴ Likewise, details that Hartman asserted Spirko provided to him concerning Mrs. Mottinger's purse were added after Hartman's notes were originally written.⁷⁵

⁷³ Bob Paynter, *Cop, Criminal Square Off in Jailhouse Duel*, *Cleveland Plain Dealer*, January 25, 2005, at A1 (Exhibit 36).

⁷⁴ See Handwritten Notes of Interview with John Spirko by Paul Hartman, December 10, 1982, State Exhibit 104 (Exhibit 39).

⁷⁵ See Handwritten Notes of Interview with John Spirko by Paul Hartman, November 29, 1982, State Exhibit 99 (Exhibit 40) (indicating that the words "loop" and "brown trim around edges" were added after the original notes were written). In addition, in certain

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In addition, Spirko's alleged knowledge of a chrome-plated .357 magnum with ivory handles that Gibson allegedly possessed – another detail of “particular significance,” according to the State and the Sixth Circuit's 2-1 majority opinion – also appears to be information that was added to Hartman's notes after they were originally written.⁷⁶ Hartman and the State's continued reliance on this particular fact is deeply troubling, given the fact that Hartman has now acknowledged that by the time of Spirko's trial he had determined that Gibson had not been involved in the Mottinger crime in any way. Given that conclusion, what conceivable relevance could Hartman attribute to Spirko's knowledge of what kind of gun Gibson possessed? But the State persists, and its continued reliance on this fact underscores the continuing misrepresentations that the State is advancing to secure Spirko's conviction and death sentence. As Paynter notes in his articles, it is not possible to tell whether information in Hartman's notes actually came from Spirko or was supplied by Hartman, “because of the way the interviews were conducted.” Hartman did not tape record his interviews and never asked Spirko to write a statement or to read or sign any of the notes Hartman took. Most critically, Hartman never asked

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interviews where the State alleges that Spirko provided confidential information regarding Mrs. Mottinger's purse (*see, e.g.*, Handwritten Notes of Interview with John Spirko by Paul Hartman, November 2, 1982 (Supplemental Exhibit 1); Handwritten Notes of Interview with John Spirko by Paul Hartman, November 29, 1982 (Supplemental Exhibit 2), a careful reading of what Spirko actually said appears to reference not details regarding Mrs. Mottinger's purse but details regarding a bag that the perpetrators might have carried.

⁷⁶ *See* Handwritten Notes of Interview with John Spirko by Paul Hartman, January 12, 1983, State Exhibit 109 (Exhibit 41) (showing word “CHROME” added in different letters above the initial description of the gun); *see also* Sandra Livingston and Bob Paynter, *New Claim Raised in Spirko Case*, Cleveland Plain Dealer, April 10, 2005 (Exhibit 42).

Spirko to review any additions or corrections to the notes. In short, Hartman did not follow standard investigative procedures.⁷⁷

The State also relies heavily on the statement in Spirko's letter to his girlfriend that "Paul [Hartman] knows that I know something about this case, there are some thing that I know that only the persons who did this shit know, there are no if and ands [sic] about that, he knows I know"⁷⁸ Yet a careful reading of that statement in the context of Spirko's entire letter to his girlfriend reveals that it is only another lie, this one intended to assure his girlfriend that he will be able to protect her from the serious charges she faced for assisting him in his attempt to break out of jail. Just before the passage quoted so often by the State, Spirko professes his love to her and assures her that "the other thing is that you ain't going to jail, here is the reason why" Once again, lying – whether to investigators, at trial, or to one's girlfriend – is not a capital offense.

The State's assertion that Spirko's conviction rests on his alleged oral statements to Inspector Hartman does not withstand careful scrutiny, particularly because the statements allegedly were made to Hartman (whose continuing credibility has now been called into serious question), were not recorded, and were not reduced to writing for Spirko to review or revise. There can be absolutely no confidence in a verdict now sought to be supported exclusively by the statements of Spirko as allegedly told to Hartman, and Spirko's death sentence simply cannot be allowed to be carried out based on those alleged statements.

⁷⁷ Bob Paynter, *Cop, Criminal Square Off in Jailhouse Duel*, Cleveland Plain Dealer, January 25, 2005, at A1 (Exhibit 36). Statement of William Latham at John Spirko Clemency Hearing, August 23, 2005 (Exhibit 44); Letter from Professor Steven Drizin to Governor Bob Taft and Ohio Parole Board, August 16, 2005 (Exhibit 43).

⁷⁸ Letter from Luann Smith to John Spirko, January 13, 1983, at 5 (Exhibit 46).

15. Hartman’s Presentation Letter Omits All Mention Of Any Evidence Suggesting That Delaney Gibson Had No Involvement In The Mottinger Crimes

The Presentation Letter is the detailed memorandum authored by Paul Hartman and presented under his signature, along with the signature of Thomas Strausbaugh, directed to the prosecutors and supposedly summarizing all the evidence developed and leading to the capital indictments of John Spirko and Delaney Gibson.⁷⁹ It took several weeks to prepare and is extraordinarily detailed, comprising some 57 single spaced pages and attaching 82 exhibits.⁸⁰ It is the kind of memorandum routinely prepared by the lead investigator as he or she makes a recommendation to the prosecutor with respect to how a particular case should be handled and is then used by the prosecutor as a road map in any subsequent prosecution. As Hartman himself testified, its purpose is to inform the prosecutor of the “good, the bad and the ugly” and to make sure the prosecutor is not surprised by any evidentiary developments.⁸¹ It also may serve as a guide to the prosecutor as he makes his decisions regarding how to satisfy his statutory and constitutional discovery obligations to the defense.

In this case, the Presentation Letter purported to support the indictments of both John Spirko and Delaney Gibson on capital murder charges. Yet absolutely nowhere in the very detailed Presentation Letter, the many exhibits appended thereto, or any supplement to the Presentation Letter, is there any mention of Hartman’s determination that, in fact, Delaney

⁷⁹ Mem. from Paul Hartman and Thomas Strausbaugh to Stephen Keister, September 12, 1983 (“Presentation Letter”) (Exhibit 51).

⁸⁰ *Id.*

⁸¹ Hartman Dep. 115 (Exhibit 3).

Gibson had had no involvement in the Mottinger crimes; the evidence that had been collected by Hartman indicating that Delaney Gibson was in North Carolina on the weekend of August 7 and 8, 1982; the fact that Gibson's co-workers reported, as corroborated by the photographs that were not referenced in the Presentation Letter, that Gibson had a full beard continuously in August 1982; the fact that work records reflected Gibson's presence in North Carolina on August 10, 1982; the fact that Hartman had made extensive efforts to establish telephone contact between Spirko and Gibson prior to the Mottinger abduction and was unable to do so; the fact that keys had been recovered from the scene of the Elgin Post Office, believed to have been dropped by the perpetrators of the crime; the fact that these keys could not in any way be linked to either Spirko or Gibson; and any other evidence viewed by Hartman and relied upon him in his determination that in fact Gibson had absolutely nothing to do with the Mottinger crime.

The failure to mention any of these items of evidence or to mention Hartman's own determination that Gibson had absolutely nothing to do with the Mottinger crimes, can have no innocent explanation. A memorandum that is admitted to have the intended purpose of informing the prosecutor of all facets of his case cannot be said to be honestly prepared when all of the exculpatory facts contradicting the State's eventual trial theory are carefully omitted. In the context of what we now know to have been the evidence accumulated by Hartman leading him to the determination that Gibson had absolutely nothing to do with the Mottinger crimes, the Presentation Letter becomes nothing short of a fraud.

There is absolutely no way the prosecutor could have fulfilled his statutory and constitutional obligations without this information having been disclosed to him. Under these highly irregular and disturbing circumstances, this Parole Board should not allow Spirko's execution to go forward when his prosecution was so clearly predicated on a misleading and

wholly incomplete understanding of the evidence by the prosecutor, as reflected in the Presentation Letter.

16. Much Of The Exculpatory Evidence Indicating That The Spirko/Gibson Theory Of Prosecution Was Untrue Was Missing From The Investigative Files

All evidence collected during the investigation of the Mottinger crimes was supposed to have been maintained in the investigative files. Yet all of the most significant pieces of evidence, ultimately relied upon by Hartman to conclude that the Spirko/Gibson theory was untrue, were missing from the investigative files. For example, none of the fifty-two photographs collected by Hartman that showed Gibson in North Carolina on the weekend of August 7-8, 1982 and that depicted him with a full beard were found in the investigative files. The receipt evidencing a purchase by Delaney Gibson in North Carolina on August 7, 1982, was not found in the investigative files. The motel records evidencing the Bentleys' presence in North Carolina on the night of August 8, 1982, after their visit with the Gibsons, were not in the investigative files. Records reflecting the failed efforts of Paul Hartman to establish telephone contact between Gibson and Spirko were not located in the investigative files. The evidence reflecting the recovery of keys from the scene of the Elgin Post Office and Hartman's failed efforts to link those keys to either Spirko or Gibson was not found in the investigative files.

No one has been able to offer any explanation as to why this evidence was not located in these files. When questioned, each witness stated that the evidence should have been in the files, but not one could suggest a reason why the evidence was not in the files. The failure of this evidence to be maintained in the investigative files is particularly troubling because it was the review of these files by John Sabol, a court-appointed independent third party, that was initially relied upon by the State in defense of its failure to disclose this information to Spirko. The State

had claimed that it satisfied its discovery obligations by turning its files over to Sabol for an independent review.⁸² Of course, Keister now acknowledges that the Sabol review did not in any way obviate or minimize his obligations under the applicable statutes or under the constitution.⁸³ But in any event, neither Sabol nor Keister could disclose that which was not subject to review.⁸⁴

Just like the failure of Hartman to put in his Presentation Letter any reference to his own determination that Gibson had absolutely nothing to do with the Mottinger crime or the evidentiary bases for that determination, the failure to maintain this same evidence in the investigative files must lead the Parole Board to the conclusion that the process was being manipulated to allow the State to present an untrue theory, evidence, and argument to the jury. Under these circumstances, the Parole Board simply cannot allow the jury's conviction and death sentence to stand.

17. The Principal State Witness At Trial And Lead Investigator, Postal Inspector Paul Hartman, Has Lied And Made Misrepresentations Under Oath, And His Testimony Cannot Form The Basis For Spirko's Conviction And Death Sentence

Wholly and completely independent of the fact that the State concealed the results of Inspector Hartman's thorough investigation of Delaney Gibson's appearance and whereabouts in North Carolina in August 1982 and concealed the evidence and his conclusion that Delaney Gibson had absolutely nothing to do with the Mottinger crime, and wholly independent of the fact that the State nonetheless proceeded at trial with a theory, evidence, and argument it knew to

⁸² Proceedings before Parole Board, August 23, 2005.

⁸³ *Id.*

⁸⁴ *Id.*

be untrue, Spirko's conviction and death sentence cannot be allowed to stand because it has now been shown that Postal Inspector Hartman has continued to lie and make misrepresentations in connection with this case.

In April 2004, Hartman participated in a tape recorded interview with Connie Mottinger, who was accompanied by Theo and Marlene Bennett. During that interview, Hartman stated that based upon the entirety of his investigation, he had concluded prior to the Spirko trial that Gibson had absolutely nothing to do with the Mottinger crime; that he had communicated the underlying facts and his conclusion to prosecuting attorney Stephen Keister and other members of the investigating team; and that nonetheless the decision was made to prosecute Spirko with a theory, evidence, and argument that Spirko and Gibson together committed this crime.⁸⁵ Hartman knew that his interview of April 2004 was tape recorded.⁸⁶ In January 2005, Hartman was interviewed by Bob Paynter of the Cleveland Plain Dealer in another tape recorded interview during which Hartman repeated the same assertions.⁸⁷ In April 2005, Hartman was interviewed on the telephone by undersigned counsel, at which time Hartman again repeated the same assertions.⁸⁸ Hartman believed that interview to also have been tape recorded.⁸⁹ As a

⁸⁵ Mottinger Tr. at 5 (Exhibit 2); Deposition Transcript of Connie Mottinger ("Mottinger Dep.") at 77 (Exhibit 52).

⁸⁶ Hartman Dep. 25 (Exhibit 3).

⁸⁷ Paynter Tr. at 105 (Exhibit 19); Hartman Dep. 236-37 (Exhibit 3).

⁸⁸ Aff. of Thomas Hill at 2-3 (Exhibit 1).

⁸⁹ Hartman Dep. 214 (Exhibit 3).

result of these statements, Spirko's habeas counsel filed a motion in United States District Court seeking relief from that Court's denial of Spirko's habeas petition.⁹⁰

Hartman was made aware of that motion by representatives of the Attorney General's Office, who worked with Hartman to obtain evidence to oppose the motion.⁹¹ On May 1, 2005, Postal Inspector Hartman executed a sworn affidavit for submission to the federal court.⁹² By that time, Theo Bennett had already told Hartman that he had destroyed the tape that had been made of Hartman's interview with Connie Mottinger and the Bennetts.⁹³ However, Hartman was

⁹⁰ Pet. John Spirko's Mot. For Relief from Judgment, filed April 27, 2005. (Exhibit 53).

⁹¹ Hartman Dep. 7-8 (Exhibit 3).

⁹² Aff. of Paul Hartman (Exhibit 55).

⁹³ "Well, by virtue of the fact that this was executed on May 1 and believing that Mr. Bennett's surgery had occurred well prior to that time, I would believe that I would have known that he had destroyed those tapes." Hartman Dep. 262-63 (Exhibit 3). On Good Friday (March 25, 2005) Mr. Bennett, after having receiving repeated requests by telephone and email from Spirko's counsel to provide the tape, destroyed the tape:

So I'm pretty frustrated about this. And I just went and got those tapes. I just took them out and put them on the garage floor and a big old balpine hammer I used to carry on my front seat because I never carried a gun, and I beat the hell out of those tapes and I threw them in the trash and that is where they are.

Deposition Transcript of Theo Bennett, May 25, 2005, at 32, hereinafter "Bennett Dep." (Exhibit 54). Mr. Bennett never told undersigned counsel, who had made repeated requests for the tape, that he had destroyed the tape. However, Mr. Bennett did notify Hartman that he had destroyed the tape:

Q: Is that what you told Hartman, that you beat the hell out of the tapes?

A: I probably did, and I said I threw them in the trash. That's fine, whatever.

...

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unaware that a transcript had been prepared prior to the tape's destruction: "I had no knowledge of them [transcripts] or of any notes or purported transcript."⁹⁴ With respect to the interview with Paynter, Hartman believed that the tape still existed at the time he executed his affidavit, and Hartman also believed that undersigned counsel had taped their conversations with him.⁹⁵ Such was the state of Hartman's belief on May 1, 2005.

It is, therefore, very noteworthy that in his sworn affidavit filed with the federal court, Inspector Hartman swore that he never told Connie Mottinger that he had told Stephen Keister that Delaney Gibson had not been involved in the Mottinger crimes.⁹⁶ At the same time, Hartman was *completely silent* with respect to the issue of whether he made the exact same

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Q: And as best you recall, what, if anything, did Mr. Hartman say in response to hearing that information?

A: I suppose he laughed.

Id. at 53-54 (Exhibit 54). Hartman's recollection is similar:

He indicated to me, Mr. Bennett indicated to me that he had received several calls, telephone calls from Alvin Dunn, who in his words had been pestered him about these tapes. So he informed me that he went out with a hammer and beat them to submission. That is all I know of the tapes.

Hartman dep. at 39-40 (Exhibit 3). Hartman further acknowledged that at the time he executed his affidavit in this case, on May 1, 2005, he had already been informed by Mr. Bennett that the tapes had been destroyed. *Id.* at 40-41 (Exhibit 3).

⁹⁴ Hartman Dep. 263 (Exhibit 3).

⁹⁵ Hartman Dep. 225, 214 (Exhibit 3).

⁹⁶ Aff. of Paul Hartman at 3 (Exhibit 55).

statement to Bob Paynter and then again to undersigned counsel, even though those additional statements by Hartman were squarely raised in Spirko's motion. Clearly, Hartman felt quite comfortable swearing that he had not made statements to Connie Mottinger when he believed that the tape of that interview had been destroyed and no transcript existed, and was uncomfortable making the same denials when he believed tapes existed of his interviews with Paynter and with Spirko's counsel. Later, during his deposition, Hartman made an effort to continue to deny he made certain statements to Connie Mottinger and the Bennetts. When confronted at his deposition with the transcript of his interview with Connie Mottinger, Hartman claimed that "it is either in error or I misspoke."⁹⁷

Connie Mottinger was unequivocal that Hartman's statement in his sworn affidavit was not true:

Q: In your view, is that a true statement by Hartman?

A: No, it is not.

Q: And please describe why it is not true.

A: Because I heard him with my own ears and those tapes will prove it. ...⁹⁸

Even though Hartman denied that he told Mrs. Mottinger and the Bennetts that he had concluded prior to trial that Gibson had nothing to do with the Mottinger crime and that he had shared this conclusion with Keister, Hartman in his deposition actually acknowledged that he made *the exact same statements* to Bob Paynter and undersigned counsel. However, quite

⁹⁷ Hartman Dep. 259 (Exhibit 3).

⁹⁸ Mottinger Dep. at 77 (Exhibit 52).

remarkably, Hartman now claimed that he made these statements in a calculated effort to purposely mislead Paynter and counsel:

Q: Were you purposely untruthful?

A: There was a time when I misled him [Paynter], yeah.

...

Q: So your testimony today is that you purposely misled him?

A: Absolutely.

Q: So that – with respect to what you felt about Delaney Gibson?

A: That's right.

Q: So that – did you also purposely mislead Mr. Dunn and myself [Thomas Hill]?

A: Yes, I withheld facts that would lead you to an opposite conclusion, perhaps.

...

Q: I mean, if I understand what you said before, you made a conscious effort when you were talking to Mr. Paynter to mislead him?

A: With regard to that issue, yes.

Q: Then you followed that on by trying to mislead Mr. Dunn and myself as well?

A: That's correct, with regard to that issue.

Q: That issue being your state of mind with respect to Mr. Gibson's involvement?

A: That's correct, that's right.⁹⁹

In the very next breath, Hartman asserted that while he had deceived Paynter and undersigned counsel about his conclusion the Gibson was not involved and his sharing of that conclusion with the prosecutor, he had been truthful when he had made the exact same statements to Connie Mottinger and the Bennetts:

Q: All right. Now, when you were talking to Ms. Mottinger and Mr. Bennett, were you trying to mislead them as well?

A: No, no.¹⁰⁰

Hartman then testified that he had told Tim Prichard and others from the Attorney General's office that he had misled Paynter and counsel:

Q: In talking to these gentlemen [from the Attorney General's office], you acknowledged that you, in fact, said the things that we claimed you said, but even though you said them, they were not correct and true?

A: What I said to these gentlemen [from the Attorney General's Office] was that I misled Paynter and that I misled you, simply that, nothing more.¹⁰¹

⁹⁹ Hartman Dep. 228-29 (Exhibit 3).

¹⁰⁰ Hartman Dep. 229 (Exhibit 3).

¹⁰¹ Hartman Dep. 268-69 (Exhibit 3).

The Attorney General's Office never advised counsel that Hartman had tried to mislead us. In questioning Hartman, the Attorney General's office suggested that Hartman had never told the Office of his deception. Hartman, however, stuck to his guns:

Q: And isn't it true that you never said the words to us [the Attorney General's Office] that you misled Bob Paynter, when we met with you at Bob Evans. You never said the words that "I misled Bob Paynter"?

A: No, that is not true. I remember stating specifically that I did mislead the reporter and the defense attorneys. You may not have heard it, but I said it.¹⁰²

Furthermore, during his deposition Hartman was asked whether he had ever been the subject of any complaints or investigation while a postal inspector, and Hartman responded by saying he had not, except with respect to one incident where he had discharged his firearm.¹⁰³ It now appears that this response by Hartman was also not truthful and indeed misled Spirko's undersigned counsel and prevented them from pursuing the other complaints filed against Hartman while at the Postal Inspection Service. In an unsolicited letter received by counsel on September 14, 2005, Gregory Duerr, a Postal Inspector in the Cleveland Office with 23 years' experience, states that he and a number of other postal inspectors had filed formal complaints against Hartman, presumably based upon their experiences with him which Duerr characterized as "bordering on criminal"; that an investigation was conducted by the Postal Service; that an investigative file exists with respect to that investigation; and that ultimately Hartman was forced

¹⁰² Hartman Dep. 289-90 (Exhibit 3).

¹⁰³ Hartman Dep. 34 (Exhibit 3).

to take early retirement as a result of this investigation.¹⁰⁴ Obviously, the underlying allegations that gave rise to the investigation are of grave significance, as are Hartman's false answers under oath to questions about any prior investigations.

It is quite clear that both in his affidavit and sworn deposition testimony, Hartman has not been truthful. Not only were his misrepresentations particularly and directly relevant to the issues at hand before the United States District Court, but as the State's chief trial witness and lead investigator, his now proven lack of candor independently calls into serious question the legitimacy of Spirko's capital conviction. There can be no doubt that Spirko's conviction required the jury to find Hartman to be truthful and credible. Certainly, the Governor cannot now allow Spirko's execution to go forward when his principal accuser and the State's chief witness at trial has continued to demonstrate his willingness to misrepresent the truth in order to secure and now preserve Spirko's conviction and ultimate death sentence.

18. Spirko's Own Conclusive, Independently Corroborated Alibi Places Him In The Toledo Area At The Time Of The Mottinger Abduction

In light of the State's evidence, including its improper use of Opal Siebert's erroneous eyewitness identification, it should come as no surprise that the jury did not carefully consider John Spirko's own independently corroborated alibi placing him in Toledo at the time Betty Jane Mottinger was being abducted in Elgin. It is incumbent upon the Parole Board and the Governor to independently evaluate this evidence and to assess the impact it would have had on the jury in light of the State's misconduct and improper use of its eyewitness identification testimony.

¹⁰⁴ Letter from Gregory A. Duerr to Leroy Heath, August 31, 2005 ("Duerr letter") at 1 (attached as part of Exhibit 56).

On August 9, 1982, John Spirko, having just weeks earlier been paroled from prison in Kentucky, was living with his sister Cathy Carpenter in Swanton, Ohio. Swanton is over 100 miles from Elgin, and, according to the 2005 version of MapQuest, it today takes 2 hours and 9 minutes to drive from Swanton to Elgin. According to testimony at trial, in 1982 it took 2½ hours to make that drive. Swanton is also more than a half-hour drive from Toledo.

On Monday morning, August 9, trial testimony established that Cathy Carpenter drove Spirko into downtown Toledo at around 9:00 a.m. for the initial meeting with his parole officer, Steven Lohmeyer. They arrived at Mr. Lohmeyer's office around 9:30 a.m., waited about 15 minutes to see him, then jointly met with Lohmeyer for a short while, at which time Lohmeyer excused Cathy Carpenter and met alone with Spirko until late that morning. Carpenter and Spirko then returned to Swanton, Ohio.¹⁰⁵ By that time Cathy Carpenter, who suffered from migraines, was in distress and called her doctor, sometime right after noon, when he began office hours, to schedule an appointment to receive a shot to relieve her pain. Carpenter and Spirko drove to Dr. Bringman's office; Carpenter received her shot; and Spirko drove home because Cathy Carpenter was not allowed to drive after receiving the medication.¹⁰⁶ When they returned home to Swanton, they discovered that the postman had left a notice of an undelivered package for John Spirko at Cathy Carpenter's home. Spirko walked to the post office to retrieve the package that had been sent to him from the prison in Kentucky and that contained his belongings. When Spirko returned to his sister's home and opened the package, he discovered that his television was missing and at 2:14 p.m. that afternoon, Spirko called the prison in

¹⁰⁵ Trial Tr. at 2996-97, 3001, 3481-83 (Exhibit 57).

¹⁰⁶ Trial Tr. at 3001, 3230-31 (Exhibit 57).

Kentucky to complain about the missing TV.¹⁰⁷ Cathy Carpenter went to bed with her migraine.¹⁰⁸

Quite obviously, this sequence of events could not have occurred if Spirko was abducting Betty Jane Mottinger in Elgin at 8:30 a.m. on that same day. Furthermore, and most significantly, this sequence of events is completely corroborated by independent sources. Remarkably, the sign-in log from the Toledo parole office for August 9, 1982, was never located when requested by the defense, and Lohmeyer himself produced no records or calendars reflecting his exact schedule for that day.¹⁰⁹ However, Lohmeyer testified clearly that he met with Spirko on August 9; testified that he did not recall what time of the day the meeting was, but testified that when he spoke with Cathy Carpenter on that day about the rules for her brother's parole, she did not appear to be medicated or drowsy, and that he then conducted a rather lengthy initial interview of Spirko.¹¹⁰ Dr. Bringman testified that he treated Cathy Carpenter on August 9 sometime after noon and that she was accompanied by someone who could drive her home because the medication causes drowsiness and slowness of speech, so she was not allowed to drive after receiving it.¹¹¹ Representatives from the post office testified that there was an attempt to deliver a package for Spirko at Mrs. Carpenter's residence on the morning of August 9; that no one was home and a notice was left to pick the package up at the

¹⁰⁷ Trial Tr. at 3004, 3236 (Exhibit 57).

¹⁰⁸ Trial Tr. at 3009 (Exhibit 57).

¹⁰⁹ Trial Tr. at 3029-30 (Exhibit 57).

¹¹⁰ Trial Tr. at 3029-35 (Exhibit 57).

¹¹¹ Trial Tr. at 3229-31 (Exhibit 57).

post office; and that it was retrieved from the post office that afternoon.¹¹² Independent telephone records introduced at trial by a representative from United Telephone of Ohio reflect that a phone call was made from the Carpenter residence to the prison in Kentucky at 2:14 p.m.¹¹³

There is absolutely no credible timeline that can account for these corroborated events and still allow Spirko and Gibson – two people who had absolutely no prior connection to Betty Jane Mottinger or Elgin, Ohio – to have abducted Betty Jane Mottinger at 8:30 a.m. in Elgin, more than 100 miles and 2½ hours away. The State at trial posited – as it was forced to do – that Spirko met with his parole officer in the afternoon, not in the morning. Of course, Lohmeyer could not have met with a lucid and fully functioning Cathy Carpenter in the afternoon, since her own doctor testified that he had treated and medicated her that afternoon. Moreover, it is impossible, and defies all notions of common sense and believability, to assume that John Spirko somehow made his way 2½ hours from Swanton to Elgin; met up miraculously with Delaney Gibson with no prior communications; at 8:30 a.m. robbed the most rural of all post offices of insignificant things of value; abducted the postmistress; then somehow abandoned the postmistress and the criminal activity and made his way back 2½ hours to Swanton to take his sister to the doctor, pick up his package from the post office, and place his call to the prison in Kentucky at 2:14 p.m.; and then drive over half-an-hour to Toledo to meet with his parole officer who, of course, had testified that he also met with Cathy Carpenter who was not under the influence of any medication or suffering any physical infirmities when he met her. Accordingly,

¹¹² Trial Tr. at 3051-52 (Exhibit 57).

¹¹³ Trial Tr. at 3236 (Exhibit 57).

Lohmeyer must have met with Cathy Carpenter (and therefore with John Spirko) in the morning, prior to her visit to the doctor.

Just as Spirko continuously challenged the State to announce its intentions with respect to the open indictment of Delaney Gibson, Spirko has challenged the State to propose a credible timeline that accounts for all of the objectively verifiable facts concerning Spirko's whereabouts on August 9, 1982 and nonetheless allows for him to have been in Elgin, Ohio, abducting Betty Jane Mottinger at 8:30 in the morning. Just as the State continuously elected to ignore our questions with respect to its intentions regarding the open Delaney Gibson indictment, the State has equally ignored our challenge to propose a credible timeline that can account for all of the objectively verifiable facts and still allow Spirko to have abducted Betty Jane Mottinger at 8:30 a.m. in Elgin, Ohio. We now know the State's answer to the question with respect to its intentions concerning the open capital indictment of Delaney Gibson – it dismissed the Gibson charges. Yet that question was only answered after the courts had rejected Spirko's habeas claims. The State must not be allowed once again to get away with its refusal to answer questions to which it simply has no credible answer.

Indeed, the State's actions before this Parole Board with respect to Spirko's own alibi have been unconscionable, irresponsible, and untrue, and its willingness to engage in this kind of misconduct can only be a reflection of its utter inability to propound a credible and reasonable answer to Spirko's verified alibi. At Spirko's initial parole hearing, the Attorney General's Office told this Parole Board that Spirko's visit to Lohmeyer had been unscheduled and that he

showed up unannounced at Lohmeyer's office.¹¹⁴ The Attorney General further informed this Parole Board that Spirko had barged into his sister's doctor's office in an effort to establish his own alibi.¹¹⁵ Both of these facts are completely false, and there is no evidentiary or other basis for the State to have made these factual assertions to the Parole Board. This Parole Board needs to be able to rely on the representations of the Attorney General. When that Office irresponsibly makes up facts with no basis and with no attribution for those facts, this Parole Board has no choice but to disregard those facts and seriously question any and all facts presented to the Board by the Attorney General's Office, as well as question the reasons why that Office would make such bold misrepresentations.

The obvious truth of the matter is that John Spirko, with his sister Cathy Carpenter, was on his way to meet with his parole officer in Toledo at the time Betty Jane Mottinger was abducted, and, at the same time, Delaney Gibson was picking tomatoes in Canton, North Carolina. The record simply could not be clearer on both accounts. Under these circumstances alone, the Governor cannot allow Spirko's execution to go forward.

19. Too Many Questions Remain Regarding the Possibility That the Mottinger Abduction And Murder Were Committed By Others Unknown and Unrelated To John Spirko

The tiny one-room Elgin Post Office stands alone in the hamlet of Elgin, Ohio, population 61. It sits a block from the main road and next to the Elgin Grain Company, the only commercial operation in Elgin. It is as unlikely a spot for a random "crime of opportunity" as

¹¹⁴ Proceeding Before Parole Board, August 23, 2005.

¹¹⁵ *Id.*

can be imagined. Rather, it is much more plausible that any persons contemplating a crime against the postmistress or post office would do so because they had a connection to the postmistress or to the post office. As Paul Hartman himself has said, “why would you pick Elgin[?]”¹¹⁶

When Clarence Mottinger, Betty Jane Mottinger’s husband, was interviewed shortly after his wife’s disappearance, he told investigators that his wife had become aware of drug activity next door at the Elgin Grain Company.¹¹⁷ This was corroborated by Betty Jane Mottinger’s sister-in-law, Dorothy Jean Bennett, who reported that she knew that Mrs. Mottinger was disgusted because of drug dealing at the Elgin Grain Company.¹¹⁸ In addition, Connie Mottinger has reported that Clarence Mottinger had told her, prior to his death, that on the night before the abduction Betty Jane Mottinger had told her husband that she was concerned and fearful because unknown and unidentified people were picking up packages from the post office that she suspected contained drugs.¹¹⁹

As it turns out, this information was later corroborated by John Willier. Willier had been interviewed by investigators in late 1982, but back then he had not been truthful. Fifteen years later, on August 1, 1997, Willier was being questioned by William Latham, an investigator for the Wyandot County Prosecutor’s office, in connection with an unrelated matter. All of a sudden

¹¹⁶ Mottinger Tr. at 5 (Exhibit 2).

¹¹⁷ Interview of Clarence Mottinger, August 16, 1982.

¹¹⁸ U.S.P.S. investigative notes of interview of Dorothy Jean Bennett at 8097.

¹¹⁹ Mottinger Dep. 69-72 (Supplemental Exhibit 6).

Willier revealed secrets that had been weighing on his mind for years. He told Latham that Dale Dingus, a man with whom he painted houses during the summer of 1982, had confessed to murdering Betty Jane Mottinger after a botched drug pickup at the Elgin Post Office. Willier further told Latham that Dingus had threatened to kill him if he ever revealed this secret. According to Willier, Spirko had absolutely nothing to do with the Mottinger crimes.¹²⁰

Willier told Latham that he wanted to talk to federal law enforcement officials about this matter. He also said he would be willing to take a polygraph test.¹²¹ Investigator Latham contacted the FBI, who referred him to the Postal Inspector General's Office. Postal Inspector Hartman also spoke at length with Investigator Latham. Remarkably, no one from federal law enforcement ever interviewed John Willier based on the information provided by Investigator Latham.¹²²

It so happens that at the time of the murder, John Willier, then 18 years old, was living in a house trailer less than a half-a-mile from the spot where Mrs. Mottinger's remains were found.¹²³ He was working that summer for Dale Dingus, painting houses, and Dale Dingus operated that business from his property, also a quarter-mile north of the isolated spot where Mrs. Mottinger's remains were found. Indeed, several of the paint colors on the shroud around

¹²⁰ Aff. of William J. Latham, October 15, 1989, at 4; Decl. of William J. Latham, April 25, 2000. (Exhibit 58).

¹²¹ Aff. of William J. Latham, October 15, 1989, at 7 (part of Exhibit 58).

¹²² Decl. of William J. Latham, April 25, 2000, at 2-3 (part of Exhibit 58).

¹²³ Aff. of William J. Latham, October 15, 1989, at 4 (part of Exhibit 58).

Mrs. Mottinger's body were found to closely resemble paint colors that Willier and Dingus applied to a house they were painting in nearby Findlay.¹²⁴

In addition, a former neighbor of Willier told investigators that she had seen Willier and two other men with a small, attractive, older woman in front of Willier's trailer the day after Mrs. Mottinger was abducted.¹²⁵ According to this witness, Willier and the woman were in the back seat and two other men were in the front seat of a two-tone tan over brown Monte Carlo – a description remarkably similar to that of the strange car reportedly seen in front of the Elgin Post Office on the morning of the abduction.¹²⁶ This eyewitness, who saw one of the men in front turn around and slap the woman in the back seat, was unable to identify the woman, but positively identified Willier who, at the time, of course, denied any knowledge of the incident.¹²⁷ Remarkably, a year after Spirko's conviction Willier was himself serving time at the Marion Correctional Institution on a drug-related conviction, when a fellow inmate stated that Willier had admitted that he had stabbed Mrs. Mottinger to death after she had learned that he was getting drug shipments through the mail, and that John Spirko was not involved in the kidnapping and killing of Mrs. Mottinger.¹²⁸

¹²⁴ Lab Report from Law Science Technologies (Exhibit 59); Aff. of William J. Latham, October 15, 1989 at 5 (part of Exhibit 58).

¹²⁵ Trial Testimony of Marjorie Clymer (Exhibit 60).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Aff. of William J. Latham, October 15, 1989 at 7 (part of Exhibit 58).

Willier, for his part, told Investigator Latham in 1997 that Dale Dingus admitted killing Mrs. Mottinger in a barn on the Dingus property, just a few hundred yards from the soybean field where her body was found.¹²⁹ Several months later, Willier told investigator Latham, Dingus came to his home, stuck a gun in his face and threatened to kill him if he revealed what he knew.¹³⁰

These facts were further corroborated by other information developed as part of the Mottinger investigation. Greg Seek was another young man from Findlay, Ohio, who was acquainted with Willier and Dingus. Seek's wife, Linda, reported that Seek and Willier both had been painting houses for Dale Dingus.¹³¹ Linda Seek reported that the last time she had seen her estranged husband before the Mottinger abduction was on August 2, and then she did not see him again until the beginning of September, when she was surprised that he had dyed his hair black.¹³² Greg Seek told his wife that he had been in Elgin, but did not want to discuss the matter.¹³³ Greg Seek left Ohio for California later in September. He was ultimately incarcerated in California and interviewed by an investigator on July 28, 1984, when he admitted having knowledge as to how Mrs. Mottinger was murdered. Initially attributing that knowledge to

¹²⁹ Aff. of William J. Latham, October 15, 1989 (part of Exhibit 58).

¹³⁰ Eight months after John Willier's 1997 conversation with investigator Latham, Dale Dingus was convicted in Louisiana of raping a 15 year old girl and was sentenced to 25 years in prison with no possibility of parole. By way of letter from the Avoyelles Correctional Center in Louisiana, Dingus has denied any involvement in the Mottinger crime.

¹³¹ Investigative interviews of Linda Seek, November 24, 1982 and July 17, 1984.

¹³² *Id.*

¹³³ *Id.*

newspaper accounts, he later changed his story and claimed to have heard from an acquaintance that Mrs. Mottinger's body had been found repeatedly stabbed.¹³⁴

In addition, investigators learned that in June 1982 Greg Seek had sold his car to another acquaintance, Leonard Burlile. Witnesses reported that at the time of the sale, the car contained a tarp, described as having a grainy texture with paint rings and a rope. These witnesses stated that the rope resembled pictures of the rope investigators showed them which had been used to fasten the tarp around Mrs. Mottinger's body.¹³⁵ Burlile also suddenly left Findlay to go out west in the beginning of September, but witnesses reported that before leaving Findlay, he said that he and his friends had gone to Van Wert and robbed the post office.¹³⁶

John Spirko was not known to this group of Findlay residents. This compilation of evidence can only lead one to conclude that there is a good possibility that some or all of these individuals, not John Spirko, are responsible for the abduction and murder of Betty Jane Mottinger. John Willier's voluntary statements to Investigator Latham – 15 years after the Mottinger crimes – only occurred because of Willier's knowledge and/or involvement in those crimes. Just as Clarence Mottinger had suspected from the beginning, this crime was drug-related and was not a simple, random robbery of a rural post office.

Under these circumstances, and coupled with all of the other evidence calling into question the legitimacy and validity of Spirko's trial and conviction, this death sentence cannot

¹³⁴ Investigative Interview of Greg Seek, July 26, 1984 (Exhibit 61).

¹³⁵ Investigative Interviews of Jim and Barb Ziessler, October 26, 1982 (Exhibit 62).

¹³⁶ *Id.*

be allowed to stand. The people responsible for Mrs. Mottinger's death have not been brought to justice. Without executive clemency, based on this record there is a strong likelihood that instead an innocent man will be executed.

20. Both Jail House Snitches Who Testified For The State Against John Spirko Have Recanted Their Testimonies

Two jail house snitches testified for the State before Spirko's jury, stating that Spirko had acknowledged responsibility for the Mottinger crimes to each of them separately and individually. We now know that both have since told others that their testimony was false and a lie.

Andre Ruffin testified for the State at trial.¹³⁷ In 1991, Thomas Henderson came forward and on his own located Spirko's post conviction counsel.¹³⁸ In a sworn affidavit, Henderson stated that he had been incarcerated with Ruffin at the time that Ruffin testified at Spirko's trial, and that immediately after Ruffin's testimony, Ruffin returned to the prison in which he was serving his sentence and informed Henderson that he had lied, and that Spirko never actually said the things that Ruffin had attributed to Spirko.¹³⁹

Leon Connors also testified against Spirko.¹⁴⁰ In 1995, Leon Connors swore in writing that he had testified falsely at Spirko's trial, and that he had been promised favorable

¹³⁷ Trial Tr. at 2582.

¹³⁸ Aff. of Thomas Henderson, January 8, 1991 (Exhibit 63).

¹³⁹ *Id.*

¹⁴⁰ Trial Tr. at 2656.

consideration by the State with respect to his own sentence in exchange for his testimony against Spirko.¹⁴¹

The jury obviously never knew that either of these men had subsequently acknowledged having lied. The jury's verdict and death sentence in some measure clearly relied upon their testimonies. Now knowing that both men have stated that their testimonies were false, this Parole Board cannot allow Spirko's conviction and death sentence to be carried out based upon testimony that was false and untrue.

21. The Jury's Decision To Impose The Death Sentence Was Made Based Upon A Fraudulent And Incomplete Trial Record

John Spirko is innocent of the abduction and murder of Betty Jane Mottinger. For all of the aforementioned reasons, had the State not concealed its evidence of Gibson's North Carolina whereabouts and bearded appearance and not proceeded at trial with a positive eyewitness identification it knew to be mistaken, the jury would have credited Spirko's own independently corroborated alibi and would not have convicted him of this aggravated murder. Even if the State, in defiance of all common sense and logic, continued to proceed under a theory that Gibson and Spirko together committed these crimes, Spirko would never have been convicted by the jury had Spirko's defense counsel been informed, as was his absolute constitutional right, of the testimonial, documentary, and photographic evidence possessed by the State showing a bearded Delaney Gibson's presence in North Carolina both immediately before and after the abduction of Betty Jane Mottinger on August 9, 1982. Defense counsel would have been able to

¹⁴¹ Letter from Leon Connors to Judge Carr, May 31, 1995; Letter from Leon Connors to Judge Carr, June 13, 1995 (Exhibit 64); Petitioner's Traverse in Response to State's Return of Writ, May 30, 2000 at 20.

show the jury that the State's theory was wrong and that Opal Siebert's identification was mistaken.

Even if by some unimaginable circumstance the jury nonetheless convicted Spirko of these crimes with full disclosure prior to trial to defense counsel of all exculpatory evidence and with the jury's full knowledge of all of the evidence reflecting Gibson's bearded presence in North Carolina at the time of the abduction and Spirko's corroborated presence with his parole officer in Toledo at the same time, the jury would not have sentenced Spirko to death. First, one of the only two specifications of aggravating circumstances presented to the jury¹⁴² – that the murder was committed for the purpose of escaping apprehension for the kidnapping – would have been defeated.¹⁴³ The jury would have been left with only one aggravating factor to weigh against mitigating factors.

In addition, under these circumstances, defense counsel certainly would have argued at the penalty phase, and we submit one or more jurors would have accepted, the proposition that there existed "residual doubt" with regard to Spirko's guilt. The jury would not have wanted to be in the position of recommending the execution of someone where that residual doubt existed. In this way, there can be no doubt that the State's misconduct at trial – first, in concealing from the defense the evidence it possessed with regard to Delaney Gibson's bearded appearance and presence in North Carolina, and second, in proceeding at trial with a theory, evidence, and

¹⁴² Indictment of John George Spirko, Jr., September 13, 1983 (Exhibit 65).

¹⁴³ In addition, Hartman has just said that he had concluded that James Clark Kelley was a "post office burglar" who "had an infinity [sic] for postal crimes," and that "Kelley was the mover" and Spirko "just followed along." Mottinger Tr. at 9 (Exhibit 2).

argument it knew to be untrue – infected not only the guilt/innocence phase of Spirko’s trial, but also completely prejudiced Spirko’s rights during the penalty phase and prevented the jury from making its life or death decision based upon a full, honest, and complete record.

Under these circumstances, and particularly in light of the substantial doubts that have been cast upon the credibility of the State’s principal investigator and principal witness at trial, the Governor should recognize that at a bare minimum residual doubt exists today and that such residual doubt warrants the grant of executive clemency.

22. A Respected Sitting Jurist On The United States Court Of Appeals For The Sixth Circuit, A Former Director Of The Federal Bureau Of Investigation, Four Distinguished Retired Federal Judges, And A Number Of Ohio Newspapers And Journalists Have Called For Further Review Of Spirko’s Case

A. Judge Gilman Had “Considerable Doubt” As To Whether John Spirko Has Been Lawfully Subjected To The Death Penalty

In his strong dissent from the majority opinion, in which the Sixth Circuit Court of Appeals affirmed the denial of Spirko’s habeas petition, Judge Gilman expressed “considerable doubt as to whether [Spirko] has been lawfully subjected to the death penalty in light of the state’s alleged *Brady* violation.”¹⁴⁴ Judge Gilman recognized that while Spirko had lied, “lying is not a capital offense.”¹⁴⁵

¹⁴⁴ *Spirko v. Mitchell*, 368 F.3d 603, 614 (6th Cir. 2004) (Gilman, J., dissenting) (Exhibit 66).

¹⁴⁵ *Id.*

Judge Gilman criticized the State for presenting a case against Spirko to the jury that was “far from overwhelming” and “far from ‘beyond a reasonable doubt.’”¹⁴⁶ Judge Gilman concluded that the State based its theory on three “shaky pillars,” including eyewitness identifications by Opal Siebert and Mark Lewis. However, “[e]ach of these pillars,” Judge Gilman noted, “has a foundation of sand.”¹⁴⁷ Moreover, Judge Gilman recognized that the State had suppressed evidence of Delaney Gibson’s alibi, but presented no forensic evidence linking Spirko to this crime.¹⁴⁸ To the extent that there were any doubts remaining regarding a “reasonable probability of a different result,” Judge Gilman was of the view that they should be resolved in favor of Spirko.¹⁴⁹

B. The Hon. William S. Sessions Asked The Parole Board To Recommend To Governor Taft That He Grant Executive Clemency To John Spirko

The Hon. William S. Sessions, former F.B.I. Director, U.S. District Court Judge, and U.S. Attorney, wrote a letter directly to this Board asking the Board to recommend that Governor Taft grant executive clemency to John Spirko. Judge Sessions said: “I believe that John Spirko may very well have been unjustly convicted, and I am convinced that his trial was infected with serious enough defects that we can have no confidence that the jury reached the decision about his guilt, and ultimately his death sentence, properly.”

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 614-15.

¹⁴⁸ *Id.* at 614, 617.

¹⁴⁹ *Id.* at 618.

The Honorable William S. Sessions served as a judge for the United States District Court for the Western District of Texas from 1974 to 1980, and as Chief Judge of that court from 1980 to 1987. He also served as Director of the Federal Bureau of Investigations from 1987 to 1993, and as U.S. Attorney for the Western District of Texas from 1971 to 1974. In describing the prosecutor's duty in the criminal justice system he says, "when prosecutors have information that the defense could use to discredit a portion of the prosecution's case, they are under a duty to disclose that information. Similarly, prosecutors are under an obligation to present only evidence they believe to be true and to argue only positions, theories, and facts that they believe to be true."

Weighing the evidence we now know existed at the time of the trial in Spirko's case, Judge Sessions concludes that "[t]here can be virtually no doubt that had the totality of the evidence establishing a bearded Delaney Gibson's presence in North Carolina been revealed, the State would have been forced to abandon the trial theory under which it proceeded. It would have been left with a case not only lacking in physical or forensic evidence, but also lacking in positive eyewitness testimony, and Spirko's final statement to Hartman would have been shown to have been as much a lie as his many prior statements." In his letter, Judge Sessions urges the Board to recommend clemency to Governor Taft to ensure that a "grave injustice, which could never be corrected, is not done and that the public's confidence in the fairness and integrity of the criminal justice system and the death penalty process is protected."

C. Four Distinguished Retired Federal Judges Argued In Favor Of Further Review Of John Spirko's Case

The Hon. John J. Gibbons, The Hon. Timothy K. Lewis, The Hon. William S. Sessions, and Thomas P. Sullivan ("*Amici*") filed an *Amicus Curiae* brief in the Supreme Court of the

United States on behalf of Petitioner John Spirko.¹⁵⁰ *Amici* focused on “the prosecution’s failure to disclose exculpatory evidence, its decision to present at trial a theory of the case inconsistent with that undisclosed evidence, and its conduct at trial.” After reviewing this case, *Amici* were “convinced that had the prosecution properly discharged its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), the Petitioner, Spirko, would have received a fundamentally different trial.”¹⁵¹ These distinguished jurists stated that “allowing the decision of the Sixth Circuit to stand without further inquiry would exalt gamesmanship over truth-seeking.”¹⁵²

Amici were troubled by the prosecutorial misconduct in Spirko’s case. The prosecutors had in their sole possession the evidence of Delaney Gibson’s alibi, namely evidence placing “a bearded Mr. Gibson more than 500 miles away at the time of the offense.” Crucially, *Amici* confidently concluded that this evidence should have been turned over to the defense. Instead,

¹⁵⁰ See Exhibit 67. The Honorable John J. Gibbons served as a judge of the United States Court of Appeals for the Third Circuit from 1970 to 1987, and as Chief Judge of that court from 1987 to 1990. The Honorable Timothy K. Lewis served as a judge of the United States Court of Appeals for the Third Circuit from 1992 to 1999, and of the United States District Court of the Western District of Pennsylvania from 1991 to 1992. The Honorable William S. Sessions served as a judge for the United States District Court for the Western District of Texas from 1974 to 1980, and as Chief Judge of that court from 1980 to 1987. He also served as Director of the Federal Bureau of Investigations from 1987 to 1993, and as U.S. Attorney for the Western District of Texas from 1971 to 1974. Thomas P. Sullivan served as the U.S. Attorney for the Northern District of Illinois from 1977 to 1981. He also served as Co-Chair of the Illinois Governor’s Commission on Capital Punishment.

Amici filed their brief “not only out of a desire that criminal defendants receive fair and just treatment, but also out of a drive to protect the integrity of, and public confidence in, the justice system.” *Id.* at 2.

¹⁵¹ *Id.* at 3.

¹⁵² *Id.* at 3.

Amici concluded that the prosecutors engaged in a game of “hide and seek” explicitly prohibited by the U.S. Supreme Court in *Banks v. Dretke*, 540 U.S. 668 (2004). While the State was in possession of photographs that it knew were taken the weekend of the offense (and not “purportedly” taken), along with some other photographs showing a bearded Delaney Gibson, the prosecutors failed to disclose them to Spirko’s counsel.

This evidence should have also “raised significant doubts about Mrs. Siebert’s identification of Mr. Gibson at the scene.”¹⁵³ Yet the prosecution hid the evidence and “presented to the jury a theory it knew was false – or at least highly questionable.”¹⁵⁴ *Amici* believed that the fact the State never even attempted to try Gibson for murder was “an admission” that its case against Spirko was false.¹⁵⁵ *Amici* argued that by presenting false or misleading evidence, the prosecution violated a fundamental obligation of its office.¹⁵⁶ As a result, the prosecution fundamentally altered the course of Spirko’s trial, “poisoning the resulting conviction and sentence.”¹⁵⁷

¹⁵³ *Id.* at 15.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 13.

¹⁵⁷ *Id.* at 16.

D. Editorial Boards And Respected Journalists From The Cleveland Plain-Dealer, The Dayton Daily News, The Mansfield News Journal Have Called For Further Review Of Spirko's Case

In January 2005, the Cleveland Plain Dealer carried a three-part series in which reporter Bob Paynter wrote a meticulously detailed account of John Spirko's story.¹⁵⁸ Immediately thereafter, The Plain Dealer Editorial Board concluded that "[t]he evidence . . . is overwhelming that Spirko had absolutely nothing to do with the murder of Betty Jane Mottinger."¹⁵⁹ The Plain Dealer expressed grave concern over the conduct of the prosecution in failing "to share with defense counsel compelling evidence that would have seriously damaged the case against Spirko. That kind of misconduct should be of great concern to Ohioans."¹⁶⁰ The Mansfield News Journal agreed: "Our opinion: Don't put Spirko to death until doubts have been put to rest."¹⁶¹ The newspaper was concerned with new evidence that Delaney Gibson did not have anything to do with the Mottinger crime. "In order for this murder to have occurred in the manner which the state alleges, Gibson must have finished visiting with relatives in North Carolina early Sunday evening, shaved his beard, jumped in a vehicle and drove more than 500 miles through the night

¹⁵⁸ Bob Paynter, *A Cold-blooded Liar*, Cleveland Plain Dealer, January 23, 2005, at A1; Bob Paynter, *A Mysterious Murder Suspect Emerges, then Disappears*, Cleveland Plain Dealer, January 24, 2005, at A1; Bob Paynter, *Cop, Criminal Square Off in Jailhouse Duel*, Cleveland Plain Dealer, January 25, 2005, at A1 (Exhibit 68).

¹⁵⁹ Editorial, *Lying Isn't A Capital Offense*, Cleveland Plain Dealer (February 3, 2005) (Exhibit 69).

¹⁶⁰ *Id.*

¹⁶¹ Editorial, *Too Many Questions*, Mansfield News Journal, July 8, 2004 (Exhibit 70).

to northwestern Ohio.”¹⁶² The editorial echoed Judge Gilman’s findings that there is serious doubt as to whether Spirko was lawfully subjected to the death penalty.¹⁶³

The Dayton Daily News called on the Attorney General to postpone the execution at least pending resolution of Spirko’s claims in federal court. It expressed grave concern that “an innocent man might soon be put to death in Ohio,” and commented that while the Attorney General is entitled to argue that John Spirko was fairly convicted, “pushing for an execution by rushing proceedings that call into question prosecutorial integrity is wrong – potentially dead wrong.”¹⁶⁴ Chief Judge Carr’s characterization that the issues before him brought by Spirko were not “a bad faith or frivolous contention” prompted the Dayton Daily News to write that “Judge Carr’s statements alone provide the court with abundant reasons to order a postponement – the fundamentally fair and decent thing to do.”¹⁶⁵

Cleveland Plain Dealer columnist Regina Brett has called into serious doubt the prosecution’s conduct after the State had learned that Gibson could not have been involved in the Mottinger crime:

He was 500 miles away. They had photos and receipts to prove it.
This new evidence contradicted the old and would ruin their case
against Spirko, so they buried it.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Editorial, *Petro Wrong to Push Execution*, Dayton Daily News, August 5, 2005 (Exhibit 71).

¹⁶⁵ Editorial, *High Court Should Delay Execution*, Dayton Daily News, August 15, 2005 (Exhibit 72).

That's right. They not only ignored the evidence, they hid it from the defense. They told the jury a story they knew to be false.

Why let the facts get in the way of a guilty verdict? After all, the public wants to feel safe, prosecutors want to look good, and police want to catch the crook.¹⁶⁶

Ms. Brett further commented that one does not have to care about John Spirko to care about whether Ohio executes him because “[i]f Ohio executes Spirko, it will be a grave injustice to justice.”¹⁶⁷ The columnist left the public with “something else to consider: If Spirko didn't do it, someone got away with murder.”¹⁶⁸

Prior to the first clemency hearing in this case, the *Plain Dealer* urged the Parole Board to recommend clemency: “enough questions have been raised to convince us that Spirko's execution would be an injustice.”¹⁶⁹ After the Parole Board called for a new clemency hearing and the Governor granted a reprieve, the *Plain Dealer* called this decision “both moral and just” because the Board will have an opportunity to reconsider the case where the “evidence against [Spirko] is flimsy.”¹⁷⁰ The Editorial Board concluded that “if Taft harbors doubts about this case, he should be prepared to use his power to grant clemency and reduce Spirko's sentence.”¹⁷¹

¹⁶⁶ Regina Brett, *Did Someone Get Away with Murder?*, Cleveland Plain Dealer, January 26, 2005 (Exhibit 73).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Editorial, *A case built on lies*, Cleveland Plain Dealer, August 20, 2005 (Exhibit 74).

¹⁷⁰ Editorial, *Revisiting Spriko Case*, Cleveland Plain Dealer, September 13, 2005 (Exhibit 75).

¹⁷¹ *Id.*

It is absolutely critical that Ohio's death penalty process be both scrupulously fair and honest, and that it be so perceived by all citizens. As these distinguished newspapers and journalists have noted, these standards simply can not be met based upon the record established to date. There are simply too many unanswered questions leading to the conclusion that John Spirko may very well be innocent and that his trial was infected with serious flaws as a result of the State's misconduct to allow an execution to go forward. Both Spirko and the citizens of Ohio deserve so much more.

23. A Former Postal Service Inspector Colleague of Hartman Claims To Have “Witnessed Unprofessional Comments And, In Some Instances Conduct Boarding On Criminal” By Hartman And Claims That He And Other Former Postal Inspector Colleagues of Hartman Are Concerned That “It Appears That An Individual Who Did Not Commit The Crime Is Going To Be Executed”

On or about September 2, 2005, the Postal Inspection Service received a remarkable unsolicited letter from Postal Inspector Steven Duerr, a 23-year veteran of the Postal Inspection Service and a former colleague of Paul Hartman when Hartman was in the Cleveland Office during the time of the Mottinger investigation.¹⁷² In his letter Duerr states that Hartman has been the subject of at least one significant investigation by the Postal Service regarding complaints about his behavior as a postal inspector.¹⁷³ Duerr states that he personally “witnessed unprofessional comments and, in some instances, conduct boarding on criminal”; states that he and approximately fifteen other inspector colleagues of Hartman at the time filed complaints against Hartman that were investigated as part of an investigation of Hartman's behavior; that an

¹⁷² Email from Elvin Crespo to Charles Wille, September 2, 2005 (part of Exhibit 56).

¹⁷³ Duerr letter (Exhibit 56).

official file exists with respect to that investigation; and that Hartman was forced to take early retirement as a result of these matters.¹⁷⁴ These facts in and of themselves are deeply troubling, not only because of the serious allegations of misconduct that they evidence, but because Hartman, as has previously been discussed, swore under oath at his deposition that he had never been the subject of any such investigation.¹⁷⁵

Of even greater concern, however, is Duerr's statement that "[b]ased on the information presented in the articles and *conversations with inspectors who were in the division at the time* [1982-1984] it appears an individual who did not commit the crime is going to be executed. Needless to say, most if not all inspectors in Cleveland have concerns about what is transpiring."¹⁷⁶ When an experienced law enforcement officer, sworn to uphold the laws and the Constitution of the United States, takes the unprecedented step of coming forward and expressing genuine concern that an injustice is being done – especially when that injustice involves the execution of an innocent man – one would expect and hope that his law enforcement agency and other interested law enforcement agencies would take serious note.

Unfortunately and distressingly, this has not occurred in this case. Quite to the contrary, the Postal Inspection Service's first reaction to Mr. Duerr's expressed concerns was to threaten him with retaliation for making these concerns public. As Duerr himself described, "I was

¹⁷⁴ Duerr letter at 1.

¹⁷⁵ Hartman Dep. at 34:7-15.

¹⁷⁶ Duerr letter at 1 (emphasis added).

threatened with increased scrutiny of my workload to ensure that I did not have time to think up questions.”¹⁷⁷

Not only has the Postal Inspection Service tried to sweep Duerr’s concerns under the rug, but the Attorney General’s Office has equally tried to ensure that these concerns do not receive a full and thorough investigation. Understandably, given his belief that he has been threatened by the Postal Inspection Service. Duerr is only prepared to discuss the matters contained in his letter in a public forum where all parties are able to be present. As Spirko’s counsel, we have requested that the Attorney General’s Office join us in requests to obtain all Postal Service records relating to any of the matters discussed by Duerr in his letter. We have also asked the Attorney General’s Office to join us in a request to interview or depose Duerr and others identified by him with the Postal Inspection Service. The Attorney General’s Office declined to join us in either request. Indeed, virtually the only response of the Attorney General’s Office had been to ask the Postal Inspection Service for a copy of Duerr’s personnel file.¹⁷⁸ If Duerr did not feel threatened before by the words of the Acting Postal Inspector In Charge, he certainly must have felt threatened and intimidated by the Attorney General’s request for his personnel file. Thankfully, the Postal Service has now partially relented. Although not prepared to turn over

¹⁷⁷ Duerr letter at 2.

¹⁷⁸ Petitioner John Spirko’s Mot. For Leave to Conduct Supp. Discovery, September 30, 2005; Letter from Elvin Crespo to Timothy Pritchard, September 14, 2005 (Supplemental Exhibit 7).

documents without a subpoena,¹⁷⁹ the Postal Service is making Duerr available for an interview.¹⁸⁰

It is inconceivable that the Attorney General's Office would want to proceed with Spirko's execution without a complete and full exploration of all of the facts and circumstances that led Inspector Duerr to write this remarkable letter and to express the concern that "an individual who did not commit the crime is going to be executed. Needless to say, most if not all inspectors in Cleveland have concerns about what is transpiring."¹⁸¹ On the record that is before the Parole Board now, Duerr's allegations and concerns alone, coupled with the Attorney General's irresponsible and cavalier response to these concerns, should cause the Parole Board to take action to halt Spirko's scheduled execution.

24. The Attorney General's Office Has Made Numerous Misstatements and Misrepresentations to the Parole Board

In its presentation to the Parole Board at Spirko's clemency hearing on August 23, 2005, the Attorney General's Office made many important misstatements and misrepresentations that may have influenced the Board's view of both Spirko's innocence and the fairness of the proceedings to date.

¹⁷⁹ Spirko has asked Judge Carr to issue the subpoena and order discovery. The Attorney General's Office has opposed this request.

¹⁸⁰ Duerr's interview is scheduled for October 7, 2005.

¹⁸¹ Duerr letter at 1-2.

A. The Attorney General's Office Misled The Parole Board About The Initial Interviews of Delaney and Margie Gibson In April 1983

The Attorney General's Office stated that Gibson never said during his April 21, 22, and 29 interviews that he was with the Bentleys on the weekend of August 7-8. However, Gibson, who had been arrested on a fugitive warrant, was never *asked* where he was on August 7-8, or on August 9, for that matter, nor was there any way for Gibson to know that these particular dates had any significance to the investigators. In one of the interviews Gibson stated that he left the Canton, North Carolina, area around July 4, 1982, and that he "seemed assured that someone in the Burress family would remember this particular incident in July."¹⁸² In another interview he stated that he had returned to Bear Branch, Kentucky, four to five times, and he described the usual times of day he would leave and return from these trips. He also said he had only been to Ohio once.¹⁸³ Clearly, the interviewers asked Gibson to describe the instances when he left Canton, not to provide his whereabouts for himself for the period of August 7-9. Surely if the interviewers had asked Gibson where he was on the weekend of August 7 and he was unable to tell them, they would have noted that important fact in their interview notes.

Similarly, the Attorney General's Office misleadingly stated that when Margie Gibson was first interviewed she did not state that she and her husband were with the Bentleys on August 7-8. However, in the initial interview investigators conducted with Mrs. Gibson, investigators asked her general questions about her husband's whereabouts since his March 1981

¹⁸² Mem. of Interview with Delaney Gibson by G.B. Roberts and T.A. Strausbaugh, April 22, 1983 (Supplemental Exhibit 8).

¹⁸³ Mem. of Interview with Delaney Gibson by T.A. Strausbaugh and G.B. Roberts, April 21, 1983 (Supplemental Exhibit 9). *See also* Mem. of Interview with Delaney Gibson by G.B. Roberts and J.T. Dent, April 29, 1983 (Supplemental Exhibit 10).

escape from the Hyden, Kentucky, jail, but investigators did not tell Mrs. Gibson that her husband was a suspect in the Mottinger crime and remarkably did not ask her about her husband's specific whereabouts on August 9, 1982. The memorandum says, "I asked Mrs. Holland [Gibson] if she would tell me the activities of Lannie and herself since the time of their stay in Paducah, Kentucky until the arrest of Lannie at Canton, North Carolina."¹⁸⁴ Delaney Gibson had been arrested in Canton as a prison escapee, and without being informed of its significance, Mrs. Gibson had absolutely no reason to know the date of August 9 had any relevance to the inspectors' inquiry. The memorandum concludes: "Margie wanted to know the purpose of our interviewing her and the interest by the Post Office to their whereabouts. I explained that upon further investigation, her question could possibly be answered. Interview was terminated at this point."¹⁸⁵

Until the August clemency hearing, the State has never seriously disputed that Gibson was in North Carolina the weekend of August 7-8. The Attorney General's Office at the hearing was asking the Parole Board to believe that the photographs and receipts and work records do not prove Gibson's whereabouts. But Hartman himself believed the evidence proved Gibson was in North Carolina at least until 6:00 p.m. the night before the abduction. Furthermore, the prosecution must have believed the jury would agree with Hartman's conclusion, which is why Gibson was never brought to trial.

¹⁸⁴ Mem. of Interview with Margie Gibson by B.C. Pfeiffer, April 25, 1983 (Exhibit 7).

¹⁸⁵ *Id.*

B. The Attorney General's Office Falsely Stated That Newspapers Never Printed Information About A Cut or Torn Curtain

The Attorney General's Office repeatedly represented to the Parole Board that it was never reported in the press that the tarp was torn or cut. The Attorney General's Office stated that on December 4, 1982, Spirko told interviewers that the shroud was torn, and because this information was not released to the press, Spirko must be the killer, because he "knows things only the killer could have known." The Attorney General's Office said the torn curtain detail "isn't revealed in any newspaper article, despite whatever they [Spirko's attorneys] said, despite whatever amicus are filed by whatever former judges or honorable this or that." In response to Spirko's assertions that the information about the torn or cut curtain was in the newspapers, the Attorney General's Office said, "that is flat out false" and it is an "evolution of deception and concealment on Spirko's attorneys' part."

In reality, however, the newspapers were filled with reports of the torn or cut, paint-splattered theater curtain, reporting it as the first big break in the Mottinger case.¹⁸⁶ The Review Times, for example, reported on October 21, 1982, that "learning that the fabric was theatre curtain was significant because the tightly woven, fire-resistant cotton was manufactured at relatively few firms. . . . the cloth was cut from a larger piece of material and appeared to have been used as a painters' drop cloth." Similarly, The Morning Journal reported that a "9½-by-4 foot cloth had been cut from a larger piece of material" and the Norwalk Reflector described the

¹⁸⁶ See Exhibit 77 for a sample of the articles that were published at the time.

material as “part of a theater curtain.”¹⁸⁷ At trial, when prosecutors asked Spirko how he knew about the torn curtain, he replied, “I believe I read that in the paper.”¹⁸⁸

C. The Attorney General’s Office Falsely Stated That Spirko Attempted To Create His Own Alibi

The Attorney General’s Office told the Board that Spirko did not have an appointment with his parole officer, Stephen Lohmeyer, and that he barged into his sister’s doctor’s office in an attempt to create an alibi. Both assertions are completely false, and there is absolutely no support for either assertion.

First, Lohmeyer testified that he “first personally saw Mr. Spirko on August the 9th, 1982.”¹⁸⁹ When pressed for more details, Lohmeyer testified, “we probably set up an appointment for the 9th, probably through the telephone.”¹⁹⁰ Second, there is absolutely nothing in Dr. Bringman’s testimony about Spirko barging into the office.¹⁹¹ Spirko, in his trial testimony, says he went to the registration window and asked to go in with his sister, but he was turned away, so he waited in the lobby: “the doctor wouldn’t see me, he had too many appointments, apparently, and when I went to the window to go in with her, she had to register or check into this window and the nurse told me just to wait in the lobby there, so I waited in the

¹⁸⁷ See Exhibit 77.

¹⁸⁸ Trial Tr. at 3575 (Exhibit 30).

¹⁸⁹ Trial Tr. at 3027 (Supplemental Exhibit 11)

¹⁹⁰ Trial Tr. at 3028 (Supplemental Exhibit 12).

¹⁹¹ Trial Tr. at 3226-31 (Supplemental Exhibit 13).

lobby.”¹⁹² One would think that if Spirko went to the effort to barge into a doctor’s office in order to create an alibi, someone in the doctor’s office would remember it and testify about it at trial.

D. The Attorney General’s Office Falsely Implied the Sabol Review Was Beneficial to Spirko’s Defense

The Attorney General’s Office asserted that the prosecutor took the extraordinary step of allowing an independent attorney to look at the files, and all the evidence that was in the files was presented to the independent attorney. This statement is misleading on two accounts. First, not all the evidence that had been collected by the investigators was in the files. Indeed, as has been demonstrated, virtually none of the subsequently disclosed exculpatory evidence, including the photographs, receipts, motel records, abandoned keys, or phone records, was in the Investigative File although everyone from Inspector Hartman to Inspector Strausbaugh to Prosecuting Attorney Keister has testified that these items should have been in the file, and no one has been able to offer any explanation of why they were not maintained there. Sabol could not review that which he was not provided.

Second, following his review, Sabol sent a letter to the trial court and the parties that merely catalogued the materials in very general terms and apparently made no recommendation.¹⁹³ However, not even this independent court-ordered procedure was as it appeared at the time. As Spirko’s attorneys would learn many years later, Sabol in fact sent a *second* letter to the trial court in which he recommended without qualification that the State

¹⁹² Trial Tr. at 3484 (Supplemental Exhibit 14).

¹⁹³ Letter from J. Sabol to Judge S. Walters, July 9, 1984 (Supplemental Exhibit 15).

provide access to the defense to all of the materials under *Brady*.¹⁹⁴ This second letter, also sent to the trial judge, was never provided to Spirko's attorneys or placed in the court file and was only discovered in Sabol's files by Spirko's habeas counsel in 1997. Soon after receiving Sabol's letters, the trial court denied Spirko's motion to obtain access to the investigation records. The Attorney General's Office, of course, is well aware that all this documentary evidence, including the bearded photographs, was not among the materials reviewed by Sabol, and is well aware that this hidden letter process served to mislead Spirko's original defense counsel into thinking they had been provided all *Brady* materials. The representation of the Attorney General's Office that the completely flawed Sabol review somehow lent credibility and fairness to the proceedings is misleading.

E. The Attorney General's Office Falsely Asserted That There Were Additional Details "Only the Killer Could Know"

In an October 1982 interview, Spirko had told investigators that he had been at a house where he saw a "cloth or canvas bag."¹⁹⁵ At his next interview, according to the notes of Inspector Thomas Strausbaugh, he told investigators he had seen a "cream colored canvas bag. Dark Br handles & trim. Rectangular. Approx. 12" by 18"."¹⁹⁶ The Attorney General's Office told the Parole Board that this detail was particularly critical because when investigators sat down to interview Spirko they did not know the description of the purse so they could not have suggested the details to him. However, Mr. Mottinger, the victim's husband, gave that precise

¹⁹⁴ Letter from J. Sabol to Judge S. Walters, July 10, 1984 (Supplemental Exhibit 16).

¹⁹⁵ Presentation Letter at 11 (Exhibit 51).

¹⁹⁶ T.A. Straubaug's Notes of Interview with John Spirko, November 11, 1982 (Supplemental Exhibit 17).

description of the purse to Inspector Strausbaugh on the very day she disappeared. According to the Presentation Letter, which the Attorney General's Office submitted as Exhibit 8 to its August 23 hearing materials, "Mr. Mottinger described to Inspector Strausbaugh Mrs. Mottinger's purse, to wit: a light tan-colored, canvas-like fabric, bearing brown piping around the edges, bearing two loop handles, measuring approximately twelve inches (12") wide and eighteen inches (18") deep."¹⁹⁷ The Attorney General's Office told the Parole Board that investigators went back to the family for information about the purse after Spirko showed its value by describing the bag. This statement was blatantly false.

In addition, the Attorney General's Office told the Board that Paul Hartman could not have supplied the details about Mrs. Mottinger's clothing – despite the fact that they were added to the notes at a later time and in a different handwriting style – because polygraph operator Norm Robbins was present when Spirko was interviewed. That statement was false. Norm Robbins had been present for an interview with Spirko earlier in the day (at which Spirko had incorrectly asserted that Mrs. Mottinger was stabbed in the back), but he did not witness the interview at which the description of Mottinger's clothing first appeared.¹⁹⁸

Whether the important misrepresentations and misleading statements the Attorney General's Office's made before the Board were intentional, inadvertent, or simply reflected a lack of understanding of the factual record does not much matter. From beginning to end, for over 23 years, this case has been infected with lies, false theories, untrue evidence, and improper

¹⁹⁷ Presentation Letter at 7 (Exhibit 51).

¹⁹⁸ P.M. Hartman's Notes of Interview with John Spirko, December 10, 1982 (Supplemental Exhibit 18).

argument. This Parole Board needs to be able to rely on the representations made to it by the State. Sadly, the Attorney General's Office has demonstrated that the Parole Board cannot have confidence that what it is being told is true. Under these circumstances, and in the context of the entire 23-year-old record in this case, the Parole Board simply cannot allow Spirko's execution to proceed.

IV. CONCLUSION

As the foregoing has demonstrated, the state of the record today is far different from what it was at the time of Spirko's trial in 1984. We now know that Spirko was convicted and sentenced to death by a jury that was presented with a theory of prosecution, evidence, and argument that were untrue. Most of the evidence that leads to that conclusion was known to the State prior to Spirko's trial but was concealed from his defense counsel. Indeed, the very fact that Hartman himself had determined that the State's theory, evidence, and argument were untrue, and many of the underlying evidentiary reasons for his determination, were not disclosed until very recently.

One is left with a conviction and death sentence supported only by a series of uncorroborated oral statements allegedly made by Spirko to Hartman. Yet we now know that these alleged statements leave at least as many questions unanswered as answered. Why were the statements not recorded? Why were Spirko's statements not reduced to writing and then signed by Spirko to ensure accuracy? Why did Spirko get so many facts wrong? Why did the State tell the jury that much of the information allegedly provided by Spirko was non-public, when in fact most, if not all of it, had been publicly disclosed? Why was Spirko unable to provide one scintilla of evidence not previously known to the investigators? Why could Spirko not lead Hartman to any evidence that could be corroborated? Why did Hartman add significant

additional “facts” to his notes after they were originally taken? Why are some of the most significant things Spirko supposedly said to Hartman simply not reflected at all in Hartman's notes? Why did Hartman introduce facts to Spirko, knowing that Spirko would just parrot them right back? Why, if Hartman ultimately concluded that all twelve of Spirko's statements were false, would he rest a murder conviction and death sentence on that evidence?

By themselves, these critical unanswered questions raise sufficient doubt to compel a grant of clemency. However, we also now know that Hartman’s own credibility has been seriously damaged. He has lied under oath in his recent affidavit and deposition in this case. He has admitted that he tried to mislead counsel, knowing that counsel would make representations to the courts and this Parole Board based upon his statements. He has admitted that he tried to mislead the press, and by extension, the public, knowing that the press would report his statements. He has admitted that he has allowed a conviction and death sentence to be entered and upheld for over twenty years, knowing that it rested upon a theory, evidence, and argument that were untrue. One of his own colleagues, a 23-year veteran of the Postal Inspection Service, has come forward and stated that he has concerns about Hartman’s “conduct bordering on criminal” and he is concerned that “an individual who did not commit the crime is going to be executed.”

Under these circumstances and on the record as it exists today, Spirko's execution must be halted. The Parole Board and Governor simply can not allow an execution to proceed where there is so much doubt about Spirko's conviction and death sentence.

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